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# Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1072

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners*,

v.

WILSON P. LOCKRIDGE, *Respondent*.

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ON A WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF IDAHO

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## APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 13, 1970  
CERTIORARI GRANTED MARCH 30, 1970

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**Relevant Chronology**

- 9/27/60 Complaint
- 11/ 1/60 Motion to Dismiss
- 2/15/61 Amended Complaint
- 4/ 7/61 District Court Memorandum Decision
- 4/26/61 District Court Order of Dismissal
- 3/23/62 Decision of Idaho Supreme Court
- 6/ 6/62 Answer
- 8/22/62 Motion to Strike
- 10/ 4/62 District Court Order Granting Motion to Strike
- 12/21/62 District Court Memorandum Decision on Motion to Strike
- 12/26/62 Order on Motion to Strike
- 1/ 4/63 Motion to Alter and Amend Judgment or Order
- 1/24/63 Amended Answer of Amalgamated Association;  
Amended Answer of Northwest Division 1055;  
Affidavit of Allen A. Noel; Affidavit of H. T. Oathes; Affidavit of M. C. Frailey
- 1/28/63 Pre-trial Order
- 7/ 1/63 Motion to Dismiss
- 9/11/63 Order Denying Motion to Dismiss
- 9/11/63 Petition for Mandamus [Idaho Supreme Court No. 9393]
- 10/ 1/63 Supreme Court Denial of Mandamus [Idaho Supreme Court No. 9393]
- 3/31/65 Second Amended Complaint
- 4/ 7/65 Pre-Trial Order
- 5/18/65 Pre-Trial Order

- 6/10/65 Reply by Defendants to Plaintiff's Interrogatories
- 10/11-13/65 Trial
- 6/21/66 Memorandum Decision
- 8/ 1/66 Findings of Fact, Conclusions of Law and Judgment
- 8/ 2/66 Defendants' Motion to Amend Findings of Fact, Conclusions of Law and Judgment
- 8/ 9/66 Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law and Judgment
- 9/ 1/66 Decision and Orders on Motions to Amend Findings of Fact, Conclusions of Law and Judgment
- 9/30/66 Defendants' Notice of Appeal
- 10/17/66 Plaintiff's Notice of Cross-Appeal
- 10/15/69 Idaho Supreme Court Decision

**Complaint**

[Filed: Sep. 27, 1960]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Civil No. 30613

WILSON P. LOCKBRIDGE, *Plaintiff*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, an International  
Labor Union; and NORTHWEST DIVISION 1055 of the  
AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Re-  
gional Division of the International Union, and GREY-  
HOUND CORPORATION, a corporation, *Defendants*.

**COMPLAINT**

COMES Now plaintiff above named and for causes of ac-  
tion against defendants and each of them, complains and  
alleges as follows:

**COUNT ONE:****I**

That the defendant, Amalgamated Association of Street,  
Electric Railway and Motor Coach Employees of America,  
hereinafter referred to as the International Association, is  
an organized association having as members various work-  
men skilled and trained in operating passenger motor buses  
including those owned and operated by Greyhound Corpo-  
ration throughout the State of Idaho. That said Interna-  
tional Association has its own duly elected officers acting  
for and on behalf of the International Association and hav-  
ing ultimate control and supervision over all of the mem-  
bers of the International Association and the various re-  
gional divisions.

## II

That the Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as Division 1055, is a regional division of the International Association and includes as members thereof all members of the International Association who live and work within the regional boundaries of Division 1055. That said Division 1055 has its own duly elected officers but that all members of Division 1055, and the officers thereof, as members of the International Association, are subject to ultimate authority and control of the International Association and are all subject to the constitution and general laws of the International Association.

## III

That the International Association through its international officers and officers and agents of Division 1055 have conducted and are conducting business in the State of Idaho and at various times have such officers and agents within the State of Idaho acting for and on behalf of the International Association and the members thereof within this area and Division 1055. That many members of the International Association and Division 1055 live in and are employed within the State of Idaho and the International Association is the exclusive representative of all members of the union for the purpose of collective bargaining relative to conditions of employment and for negotiation and execution of contracts with employers pertaining to such matters and by the constitution and general laws of the International Association, the International Association and the regional division in which the member resides are irrevocably authorized to act as agents for all members before any committee, board of arbitration, arbiter, court or any tribunal in any matter affecting member's status as an employee and to represent and bind the members in the presentation, prosecution, adjustment and settlement of

grievances, complaints and disputes arising out of the member's employment relationship.

#### IV

That defendant Greyhound Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is authorized to do business within the State of Idaho. That said Greyhound Corporation does business within the State of Idaho under the name Western Greyhound Lines which is a division of the defendant Greyhound Corporation. That said Western Greyhound Lines operates passenger buses and employs as drivers thereof members of the International Association including the plaintiff.

#### V

That since on or about May 16, 1943, and to and including on or about November 2, 1959, plaintiff was a member of the International Association and of Division 1055 and has been driving for Greyhound Corporation as a corporation under contracts between the International Association, Division 1055, and Western Greyhound Lines, a division of defendant Greyhound Corporation. That plaintiff on November 2, 1959, had over 16 years seniority as a bus driver with Greyhound Corporation and under contracts between the International Association, its regional divisions and Greyhound Corporation, said seniority rights in said employment have commensurate therewith benefits in working conditions and pay for plaintiff's services.

#### VI

That on or about November 2, 1959, Greyhound Corporation was notified by C. A. Bankhead, Financial Secretary of Division 1055, acting for Division 1055 in his official capacity as such Financial Secretary and acting for and on behalf of officers of the International Association, that plaintiff was not in good standing in the International Asso-

ciation and its regional Division 1055 and requested defendant Greyhound Corporation to remove plaintiff from employment. That immediately following receipt of such notice defendant Greyhound Corporation discharged plaintiff from employment.

## VII

That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of age earning in his employment an average of approximately \$7200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future, for the next 20 years and until he became 65 years of age, earning in excess of \$7200.00 per year and at the age of 65 years would be able to retire with retirement pay of approximately \$3600.00 per year.

## VIII

That in seeking and obtaining plaintiff's discharge from employment, the defendant International Association and Division 1055, acting by and through their duly authorized officers and agents, acted wantonly, willfully and wrongfully and without just cause and have deprived plaintiff of his livelihood and all the benefits from his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience and plaintiff has been harassed and subject to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

## IX

That the acts of defendants, acting through authorized officers, representatives and agents thereof were malicious, wanton and in reckless disregard of the plaintiff's rights as a free citizen of the United States and as a member of the International Association and Division 1055 thereof and plaintiff demands punitive damages in the sum of \$50,000.00.

## COUNT TWO:

## I

Plaintiff repeats and re-alleges all the allegations contained in paragraphs I, II, III, IV, V, VI and VII of Count One.

## II

That section 83 of the constitution and general laws of the International Association provides that no member shall be allowed to injure the interests of a fellow member by undermining him in place, wages or in any other wilfull act by which the reputation or employment of any member may be injured. That in seeking and obtaining plaintiff's discharge by defendant Greyhound Corporation the defendant International Association and Division 1055, acting through its authorized officers and agents, acted wrongfully, wantonly, wilfully and maliciously and without just cause and violated the constitution and general laws of the International Association and the contract then in existence between the International Association, Division 1055 and Western Greyhound Lines, a division of Greyhound Corporation, and as a result of said breach of contract on the part of defendants International Association and Division 1055, plaintiff has been deprived of his livelihood and all benefits from his employment with Greyhound Corporation that have accrued to him and would accrue to him by reason of his employment, seniority and experience and the plaintiff has been embarrassed and subjected to mental anguish all to plaintiff's damage in the sum of \$212,200.00.

## III

Plaintiff repeats and re-alleges all the allegations contained in paragraph IX of Count One.



**COUNT THREE****I**

Plaintiff repeats and re-alleges all the allegations contained in paragraphs I, II, III, IV, V, VI and VII of Count One.

**II**

That as a result of differences arising through the internal management of the International Association and Division 1055, officers of the International Association and officers and agents of Division 1055 desired to punish the plaintiff and make an example of him and deter other members of the union from asserting their true and lawful rights under the constitution and general laws of the International Association and for the purpose of coercing and intimidating other members of the union conspired, determined and agreed to make example of the plaintiff by seeking and obtaining his discharge from employment. That in furtherance of said conspiracy, said officers, agents and representatives of the International Association and Division 1055 wrongfully, wilfully and maliciously advised the employer, Western Greyhound Lines, a division of Greyhound Corporation, that plaintiff was no longer a member in good standing of the union and had suspended himself from membership and requested that he be taken out of service with the employer and said officers and agents of the International Association and Division 1055 thereby discriminated against plaintiff as a member of the union.

**III**

That by reason of said conspiracy and wrongful and unlawful acts of the defendant International Association and defendant Division 1055, and each of them, acting through their duly elected officers, and authorized agents and representatives plaintiff has been prevented from following his employment and earning a living for himself and his family and from continuing in the employment for which he has been specially trained and experienced.

That plaintiff has been deprived of his livelihood and all benefits from his employment that would have accrued to him by reason of such employment, his seniority and experience and has been harassed and embarrassed and subject to mental anguish all to his damage in the sum of \$212,200.00.

#### IV

Plaintiff repeats and re-alleges all the allegations contained in paragraph IX of Count One.

#### COUNT FOUR:

##### I

That on or about November 2, 1959, defendant Western Greyhound Lines, a division of defendant Greyhound Corporation, acting by and through its duly authorized agents, suspended plaintiff from service and within 90 days thereafter terminated plaintiff's employment upon request of one C. A. Bankhead, Financial Secretary of Division 1055, a regional division of the International Association. That the act of defendant in suspending plaintiff from service and thereafter terminating his employment was wrongful and without just cause and that it was not in conformance with the terms of the contract between defendant, acting through Western Greyhound Lines and the International Association and Division 1055, and plaintiff was so suspended and his employment terminated by defendant without any investigation on the part of defendant as to the truth of the assertions made by said C. A. Bankhead or the real status of plaintiff's membership in the International Association and in discharging the plaintiff without making such investigation and determination defendant Greyhound Corporation acted carelessly, negligently and recklessly and in violation of the employment contract with plaintiff.

##### II

That as a result of the negligence of Western Greyhound Lines, a division of defendant Greyhound Corporation, in

discharging the plaintiff from his employment therewith without making an investigation or determination of plaintiff's rights and status in said employment or with International Association and as a result the acts of Western Greyhound Lines, a division of defendant Greyhound Corporation, in terminating plaintiff from his employment in violation of the contract of employment then in existence, plaintiff has been deprived of his employment and all benefits therefrom which have accrued and would accrue to him by reason of his employment, seniority, and experience and has been embarrassed, harassed and subjected to mental anguish all to plaintiff's damage in the sum of \$212,200.00.

### III

Plaintiff repeats and re-alleges all the allegations contained in paragraph IX of Count One.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, for the sum of \$212,200.00 and for punitive damages in the sum of \$50,000.00 against defendants International Association and Division 1055 and for costs and disbursements incurred herein and such other and further relief as to the court may appear meet and equitable in the premises.

ANDERSON, KAUFMAN AND ANDERSON  
By SAMUEL KAUFMAN  
A Member of the Firm  
*Attorneys for Plaintiff,*  
503 Idaho Bldg., Boise, Idaho.

**Motion To Dismiss**

[Filed November 1, 1960]

\* \* \* \* \*

Defendants, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, and Northwest Division 1055, move the Court to dismiss the action, and each and every count thereof, on the ground that defendants are engaged in a business affecting commerce, and the purported acts complained of, if true, would constitute a labor dispute affecting commerce and would constitute an unfair labor practice within the provisions of the Labor-Management Relations Act of 1947, 20 USC Chap. 7, sub-chapter 2, Par. 158, and that the acts here complained of are within the exclusive jurisdiction of the National Labor Relations Board under the provisions of the Labor Management Relations Act of 1947, 29 USC Chap. 7, subchapter 2, Par. 151-168, and that this Court is without jurisdiction in the premises, all of which more fully appears from the affidavit of F.L. Johnson, attached hereto as Exhibit E.

\* \* \* \* \*

**Exhibit E to Motion To Dismiss**

I, F. L. JOHNSON, being first duly sworn, depose and say:

That I am the Senior Business Representative and Executive Officer of Northwest Division 1055 of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America;

That two former members of Northwest Division 1055, to-wit, Elmer J. Day and Wilson Lockridge, were removed from service with Western Greyhound Corporation for failing to maintain membership in good standing with Northwest Division 1055 as required by contract between Western Greyhound Lines and the Council of Western Greyhound Amalgamated Divisions;

That Elmer J. Day filed an unfair labor practice charge against Greyhound, Amalgamated Association and Division 1055, and the number assigned the charge against Division 1055 was 36-CB-238 filed on November 12, 1959;

That by decision dated December 15, 1959, copy of which is attached, the National Labor Relations Board, although it assumed jurisdiction for the purposes of the Act, refused to issue complaint thereon on the grounds that there was insufficient evidence of violation.

That I make this affidavit in support of a Motion to Dismiss this action as against Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America and Northwest Division 1055 of Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America on the grounds the Court lacks jurisdiction, this field of law having been pre-empted by the federal Congress.

NATIONAL LABOR RELATIONS BOARD

Nineteenth Region

407 U.S. Courthouse, 5th Avenue and Spring

Seattle 4, Washington December 15, 1959

Mr. Elmer J. Day

Route 3, Box 90

Sherwood, Oregon

Re: Western Greyhound Lines

36-CA-986

Street, Elec. Railway, and

Motor Coach Employees, Div. 1055

36-CB-238

Dear Mr. Day:

The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigation, it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D.C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D.C. by the close of business on December 28, 1959. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours,

THOMAS P. GRAHAM, JR.,  
Regional Director

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**Amended Complaint**

[Filed Feb. 15, 1961]

IN THE DISTRICT COURT OF THE JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Civil No. 30613

WILSON P. LOCKRIDGE, *Plaintiff*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY  
AND MOTOR COACH EMPLOYEES OF AMERICA, an Inter-  
national Labor Union; and NORTHWEST DIVISION 1055  
of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a  
Regional Division of the International Union,  
*Defendants.*

## AMENDED COMPLAINT

COMES Now plaintiff above named and for cause of action against defendants and each of them, complains and alleges as follows:

## COUNT ONE:

## I

That the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as the International Association, is an organized association having as members various workmen skilled and trained in operating passenger motor busses including those owned and operated by Greyhound Corporation throughout the State of Idaho. That said International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association and the various regional divisions.

## II

That the Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as Division 1055, is a regional division of the International Association and includes as members thereof all members of the International Association who live and work within the regional boundaries of Division 1055. That said Division 1055 has its own duly elected officers but that all members of Division 1055, and the officers thereof, as members of the International Association, are subject to ultimate authority and control of the International Association and are all subject to the constitution and general laws of the International Association.

## III

That the International Association, through its international officers and officers and agents of Division 1055, have conducted and are conducting business within the State of Idaho and at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of said International Association, Division 1055 and the members of the International Association. That many members of the International Association and Division 1055 thereof live in and are employed within the State of Idaho. That the International Association and regional division are the exclusive representatives of all members of the union for the purpose of collective bargaining relative to conditions of employment and for negotiation and execution of contracts with employers pertaining to such matters, and officers and agents of the International Association and Regional Division 1055 come into the State of Idaho to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of its members. That by the constitution and general laws of the International Association, said association and the regional division in which the member resides are irrevocably authorized to act as agents for all members before any committee, board of arbitration, arbiter, court or any tribunal in any matter affecting members' status as an employee and to represent and bind the members in the presentation, prosecution, adjustment and settlement of grievances, complaints and disputes arising out of the members' employment relationship.

## IV

That since on or about May 16, 1943 and to and including on or about November 2, 1959, plaintiff was a member of the International Association within the area of Regional Division 1055 thereof, and was employed as a bus driver for Greyhound Corporation, a private corporation having



as its main business purpose the operation of public busses. That all drivers of Greyhound busses, and other public bus lines, are members of the International Association and no person can be employed as a bus driver nor retain such employment unless he is a member of said International Association. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver with Greyhound Corporation and under contracts between the International Union, its regional divisions and Greyhound Corporation, seniority in said employment has commensurate therewith benefits in working conditions and compensation.

## V

That prior to November 2, 1959, C.A. Bankhead, Financial Secretary of Division 1055, acting for Division 1055 in his official capacity as such Financial Secretary, and acting for and on behalf of the International Union and the officers thereof, suspended plaintiff from membership in the union on the basis that the plaintiff was in arrears in his payment of dues contrary to the requirements of the constitution and laws of the union and thereafter notified Greyhound Corporation that plaintiff was no longer a member in good standing of the union and requested said Greyhound Corporation to remove plaintiff from employment. That immediately following the receipt of such notice, on or about November 2, 1959, said Greyhound Corporation discharged plaintiff from employment. That plaintiff was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of said Bankhead, aforesaid, were wrongful and without any lawful basis. That additionally, it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof.

## VI

That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of age, earning in his employment an average of approximately \$7,200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future for the next 20 years and until he became 65 years of age, in excess of \$7,200.00 per year, and, additionally, at the age of 65 years would have been able to retire with retirement pay of approximately \$3,600.00 per year.

## VII

That in suspending plaintiff from membership in the International Association which resulted in plaintiff's loss of employment, the defendant International Association and Division 1055, acting by and through their duly authorized officers and agents, acted wantonly, willfully and wrongfully and without just cause, and to plaintiff's knowledge, in a manner never before indulged in, and have deprived plaintiff of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience, and plaintiff has been harassed and subject to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

## VIII

That in suspending plaintiff from membership in the International Association as aforesaid, said International Association and Regional Division 1055 thereof, acting through its officers and agents, acted contrary to all custom within said union since, to plaintiff's knowledge, no member of said union, within Region 1055, had heretofore been so suspended for arrears in dues and said International Association and Division 1055 thereof, acting by and through its duly authorized officers and agents, proceeded

contrary to the constitution and laws of the International Association and precluded plaintiff from any remedy he may have under said constitution and laws. That nevertheless plaintiff did all things and performed all acts which would have been required of him under the constitution and laws had the International Association and Division 1055 acted in conformance with the requirements of the constitution and laws of the union, but to no avail. That further, any acts on the part of the plaintiff for reinstatement to membership were and would have been useless procedures on his part, it being the attitude of the officers of the International Association and Division 1055 that plaintiff would not be reinstated to membership in the International Association under any circumstances.

## IX

That the acts of defendants, acting through their authorized officers, representatives and agents, were malicious, wanton and in reckless disregard of plaintiff's rights as a free citizen of the United States and as a member of the International Association within Regional Division 1055 thereof, and plaintiff demands punitive damages against said defendants and each of them in the sum of \$50,000.00.

COUNT Two:

### I

Plaintiff repeats and realleges all of the allegations contained in paragraphs I, II, III, IV, V, VI, and VII of Count One.

### II

That Section 83 of the constitution and general laws of the International Association provides that no member shall be allowed to injure the interests of a fellow member by undermining him in place, wages or in any other willful act by which the reputation or employment of any member

may be injured. That in wrongfully suspending plaintiff from membership in the International Association, which resulted in plaintiff's discharge from employment with the Greyhound Corporation, the defendant International Association and Regional Division 1055 thereof, acting by and through its authorized officers and agents, acted wrongfully, wantonly, willfully and maliciously and without just cause and violated the constitution and general laws of the International Association which constituted a contract between the plaintiff as a member thereof and the International Association, and as a result of said breach of contract plaintiff has been deprived of his livelihood and all benefits from his employment with said Greyhound Corporation that have accrued and would accrue to him by reason of such employment, his seniority and experience and plaintiff has been embarrassed and subjected to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

### III

Plaintiff repeats and realleges all of the allegations contained in paragraph IX of Count One above.

#### COUNT THREE:

##### I

Plaintiff repeats and realleges all of the allegations contained in paragraph I, II, III, IV, V, VI and VIII of Count One.

##### II

That as a result of differences arising through the internal management of the International Association and Regional Division 1055 thereof, the officers of the International Association and officers of Division 1055 desired to punish the plaintiff and make an example of him and thereby deter other members of the union from asserting their true and lawful rights under the constitution and

general laws thereof, and for the purpose of coercing and intimidating other members of the union, conspired, determined and agreed to make an example of the plaintiff by suspending him from union membership, which suspension would and did result in the loss of plaintiff's employment. That in furtherance of said conspiracy, said officers, agents and representatives of the International Association and Regional Division 1055 thereof, wrongfully, willfully and maliciously suspended plaintiff from membership in the International Association as a result of which plaintiff, no longer being a member of said union, was discharged from his employment by Greyhound Corporation, and in so doing, the officers and agents of the International Union and Regional Division 1055 thereof conspired to and did discriminate against the plaintiff as a member of the union.

### III

That by reason of said conspiracy and wrongful and unlawful acts of the defendant International Association and defendant Regional Division 1055, and each of them, acting through their duly elected officers and authorized agents and representatives, plaintiff was deprived of his membership in the union, which resulted in his being prevented from following his employment and earning a living for himself and his family and from continuing in the employment for which he has been specially trained and experienced, and plaintiff has been deprived of his livelihood and all benefits from his employment that would have accrued to him by reason of such employment, his seniority and experience, and has been harassed and embarrassed and subject to mental anguish, all to his damage in the sum of \$212,200.00.

### IV

Plaintiff repeats and realleges all of the allegations contained in paragraph IX of Count One.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, for the sum of \$212,200.00, (and for punitive damages in the sum of \$50,000.00, together with costs and disbursements incurred herein and such other and further relief as to the court may appear meet and equitable in the premises.

ANDERSON, KAUFMAN AND ANDERSON  
 Samuel Kaufman  
 A Member of the Firm  
 503 Idaho Bldg., Boise, Idaho  
*Attorneys for Plaintiff*

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**District Court Memorandum Decision**

[Filed April 7, 1961]

• • • • •

This matter is before the Court pursuant to motions by the defendant under the provisions of Rule 12(b) I.R.C.P. The defendant Greyhound Corporation of America has been dismissed, and plaintiff has filed an amended complaint against the remaining defendants. Thus, only the motions of Amalgamated Association and the Northwest Division 1055 of the Amalgamated Association are before the Court. It has been stipulated that the motion to dismiss directed to the first complaint, may be considered as directed to the amended complaint of plaintiff.

• • • • •

Paragraph VI of the motion to dismiss raises by far the most difficult problem. This is a contention by the defendants that the matters alleged by plaintiff constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board (Title 29 U.S.C.A. Par.

157 and 158). If this contention is correct, then the matters involved in this case have been pre-empted by operation of Federal law. Plaintiff, on the other hand, contends that the matters alleged involve private right of the plaintiff, and in essence it actually is an action for breach of a contract between plaintiff and defendants, the contract in question being the constitution of the union.

The state courts, the lower Federal courts, and the U.S. Supreme Court have had great difficulty in defining the areas which have been pre-empted by the N.L.R.A. In my opinion the state Court opinions are impossible to reconcile, as are the U.S. Supreme Court opinions. However, the U.S. Supreme Court in *San Diego Buildings Trade Council v. Garmon*, 359 U.S. 236, 3 Law Ed. 2d 775, 75 Sup. Ct. 772, has made an attempt to finally define this question and has in effect narrowed or overruled some of its earlier decisions in this matter. In this so-called second Garmon decision, the Supreme Court of the United States, after stating that the policy of Congress has been to centralize labor-management relations in the N.L.R.B. as a matter of national policy, and that "when the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting", designates only two areas in which the power of the states to regulate industrial relations have not been pre-empted.

These are matters which are of "merely peripheral concern" to labor-management relations. The only example of this type of situation is *Association of Machinists v. Gonzales*, 356 U.S. 617, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923.

Secondly, matters "deeply rooted in local feeling and responsibility." I.e., violence and breaches of the peace. The Court cites as an example only *International Union v. Russell*, 356 U.S. 634, 2 Law Ed. 2d 1030.



The Court then goes on to say that if a matter is "arguably" within paragraph 7 or paragraph 8 of the N.L.R.A. then the state courts, as well as the federal courts, must defer to the N.L.R.B. and that the N.L.R.B. itself is the agency which must determine in the first instance whether a matter is an unfair labor practice or not.

Thus it seems to me that the present rule is, that the state or federal court must first determine whether a case falls clearly in or out of the exclusive jurisdiction of the N.L.R.B. If it is clearly outside, the courts can take jurisdiction. If it is clearly within the N.L.R.B.'s exclusive jurisdiction or is in the twilight zone, then the courts, both state and federal, must await determination by the administrative board as to whether the matter is deemed by it to be within its jurisdiction. Justice Harland [sic] in his dissenting opinion to the Garmon case states as much.

"Henceforth the states must withhold access to their courts until the N.L.R.B. has determined what unprotective conduct is not an unfair labor practice. \* \* \*"

It was clear that plaintiff in his original complaint alleged an unfair labor practice against Greyhound Corporation under Section 158, 29 U.S.C.A., and his terminology in his first complaint as it related to the actions of defendant union clearly indicated an unfair labor practice. In that complaint, the plaintiff several times alleged that all of defendants' acts were for the purpose of seeking a discriminatory discharge by his employer. The gravamen, it seems to me, of his present pleading is the same, in that he alleges that the defendant union wrongfully expelled him for alleged failure to pay dues; that as a result of his expulsion he lost his employment with Greyhound Corporation and to his damage. There is a clear inference that the union did this to make an example of him and to cause him to lose his employment, rather than to collect dues. If this is the claim, it is at least arguable that this constitutes an unfair labor practice. If plaintiff were seeking reinstatement in the union, such as was done in the Gonzales case,



together with loss of wages during the period of his wrongful expulsion and other incidental damages, such as his claimed punitive damages and mental pain and suffering, he would have been bringing an action to assert his rights as a member of the union against the union. However, he goes far beyond this, although it would appear that reinstatement would afford him a full remedy in that it does not appear that he could not get his job back if he were reinstated. In this case plaintiff seeks to recover damages for future loss of gainful employment and the allegations would fit a tort claim for total future disability for gainful employment. It seems obvious that he is not interested in getting back his job or asserting his union rights.

Under the rule announced by Judge Cohen in *Wax v. International Mailers Union*, 161 A2d 603 (Pa.), (whose analysis of the Garmon decision agrees with mine) plaintiff is asserting an unlawful labor practice, because he is seeking damages based upon *injuries to his employment*, as distinguished from damages based upon *injury to his rights as a union member*.

Further it appears to me that plaintiff in paragraphs I, II, III, IV, V, VI and VIII of all these counts of his amended complaint, has alleged an unlawful labor practice upon the part of the union, which is at the very least arguably within the provisions of Sections 7 and 8 of the N.L.R.A. It falls under the statement made by an annotation in 4 *L. Ed.* page 2022:

“Under the terms of Par. 8(a)(3) of the amended National Labor Relations Act, unions and employers are permitted to agree that union membership shall be a condition of employment; but a proviso to par. 8(a)(3) bars an employer who has entered into such an agreement from discriminating against an employee for nonmembership in a union if he has reasonable grounds for believing that membership was not available to the employee in question on the same terms and

conditions generally applicable to other union members, or if he has reasonable grounds for believing that the membership of the employee in question was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining union membership. A complementary provision appears in par. 8(b)(2) of the act, which specifies that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee who has been denied, or ousted from, union membership on grounds other than his failure to tender uniformly required dues and initiation fees."

Thus it seems clear to me that plaintiff alleges that defendants had entered into a lawful union security contract with plaintiff's employed Greyhound; that the plaintiff's alleged failure to pay dues when due was the claimed cause of his loss of union membership, but that the real cause was something else, and that in fact the union had waived its right or is estopped to assert its right to deny him membership on this ground; that it in effect caused plaintiff's employer to discriminate against him on grounds other than failure to tender uniformly required dues; that this constitutes an unfair labor practice and that jurisdiction of this type of situation has been taken by the N.L.R.B. in this type of situation is illustrated by the cases appearing in the above cited annotation. In particular see cases listed under 9th Circuit.

I therefore conclude that defendants' motion to dismiss on the ground that the courts of Idaho lack jurisdiction, should be granted.

Dated this 7th day of April, 1961.

**MERLIN S. YOUNG**  
*District Judge*

**Idaho Supreme Court Decision**

[Filed March 23, 1962]

IN THE SUPREME COURT OF THE STATE OF IDAHO

Boise, January Term, 1962

No. 9040

**WILSON P. LOCKBRIDGE, Plaintiff-Appellant,**

v.

**AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union,**  
*Defendants-Respondents.*

Appeal from the District Court of the Third Judicial District, Ada County. Honorable Merlin S. Young, District Judge.

Action for damages for wrongful suspension from membership in the defendant union. Plaintiff appeals from judgment of dismissal. *Reversed* and cause remanded.

Anderson, Kaufman and Anderson, Boise, for appellant.  
Bailey, Lezak, Swink & Gates, Portland, Oregon;  
Bernard Cushman, Washington, D. C.; and  
McClenahan & Greenfield, Boise; for respondents.

TAYLOR, J.

This action was brought by plaintiff (appellant) to recover judgment for compensatory and punitive damages against defendant (respondent) labor union for wrongful suspension of plaintiff's membership. Plaintiff alleges that he was a member of the union from May, 1943, to about November 2, 1959, during which time he was employed by Greyhound Corporation as a bus driver; that his suspension

from membership was based upon the contention that plaintiff was in arrears in the payment of his dues, contrary to the constitution and laws of the union; that the union notified the Greyhound Corporation that plaintiff was no longer a member and requested the corporation to discharge him which the corporation did on or about November 2, 1959, pursuant to the request and its contract with the union; and that suspension from membership was not in accord with the constitution and laws of the union, and was wrongful and without lawful basis. The complaint contains two counts in tort and one for breach of contract.

Upon motion of the defendant, the action was dismissed by the district court upon the sole ground that the complaint charged an unfair labor practice, within the exclusive jurisdiction of the National Labor Relations Board, and that the district court had no jurisdiction of the subject matter.

Plaintiff prosecutes this appeal from the judgment of dismissal.

Unincorporated associations, including labor unions, are recognized as legal entities under the laws of this state. I. C. §§ 44-701, 18-5201, 72-1010, 63-3002, 30-101(14).

The constitution and bylaws of the defendant union and the granting and acceptance of membership, constituted a contract between the plaintiff and defendant. 7 C.J.S., Associations, § 11b.

The question presented is whether the cause is one preempted by the Labor Management Relations Act of 1947. Section 7 of the act (U.S.C.A., Title 29, § 157) declares the right of employees to organize and engage in collective bargaining. Section 8 (U.S.C.A., Title 29, § 158) defines unfair labor practices on the part of both employer and employee. This section in part provides:

“(b) It shall be an unfair labor practice for a labor organization or its agents—

“(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;”

The opinion in *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L.ed 2d 1018, 78 S. Ct. 923, was rendered in an action brought in the Superior Court of California by an expelled union member, for reinstatement and damages. The California court gave judgment for the relief sought. The U.S. Supreme Court noted that to cause an employer to discriminate against an employee on some ground other than denial or termination of membership for failure to pay dues, might constitute an unfair labor practice, under § 8(b)(2). With respect to the relationship between the union and the member, the court said:

“\* \* \* But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that ‘this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .’ 61 Stat. 141, 29 USC

§ 158(b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Constr. Workers v. Laburnum Constr. Corp.*, 347 US 656, 98 L ed 1025, 74 S Ct 833.

"Although petitioners do not claim that the state court lacked jurisdiction to order respondent's reinstatement, they do contend that it was without power to fill out this remedy by an award of damages for loss of wages and suffering resulting from the breach of contract. No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A.A.A.I.W. v. Russell*, 356 US 634, 2 L ed 2d 1030, 78 S Ct 932." *International Asso. Machinists v. Gonzales*, 356 U.S. 617, 2 L.ed 2d 1018, at 1021 and 1022, 78 S.Ct. 923.

Defendant cites *Garner v. Teamsters C. & H. Union*, 346 U.S. 485, 98 L.ed 228, 74 S.Ct. 161. Distinguishing that case, the court, in *United Constr. W. v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L.ed 1025, at 1031, 74 S.Ct. 833, said:

"\* \* \* In the *Garner* Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

Defendant also relies upon *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed 2d 775, 79 S.Ct. 773. It is contended that the *Garmon* case reaffirms the *Garner* case and modifies and supersedes the *Gonzales* decision as to preemption. The Court split 5-4 as to the applicable ground for the preemption affirmed in the *Garmon* case. The majority opinion was written by Justice Frankfurter, also the author of the opinion in the *Gonzales* case.

In the *Garmon* case the unions sought an agreement by the employer that the latter would retain in his employ only union members and those who applied for membership within thirty days. Upon refusal, the unions began peaceful picketing, claiming their purpose was to educate and persuade the workers. The employer obtained a judgment in the Superior Court of California for damages and enjoining the picketing on the ground that its purpose was to force the employer to execute the requested contract, contrary to California law. The California Supreme Court



affirmed, noting that, since the National Labor Relations Board had refused to take jurisdiction of the controversy, the state courts had power over the dispute.

On the first appeal, the United States Supreme Court ruled that the refusal of the National Labor Relations Board to assert jurisdiction did not leave the state free to act, and remanded the cause for determination by the California court as to whether California law would support the judgment for damages. The California court vacated the injunction and affirmed the damage judgment.

On the second appeal (*supra*) the court said:

“When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *Ibid*.

“To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. \* \* \* \*

“\* \* \* In the absence of the Board’s clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. \* \* \* \*

“In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which



the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed 775, at 783 and 784, 79 S.Ct. 773.

Thus, the Supreme Court reaches the conclusion that the Congress has delegated to the National Labor Relations Board the legislative function of determining national policy, even though the act itself purports to spell out such policy (U.S.C.A., Title 29, §§ 141, 151). And the court abdicates, in favor of the board, the judicial function of determining legislative intent. Being an agency also of the executive branch of the government, the board is thus clothed with complete power—to make, to interpret, and to enforce the law. The citizens of the states must be content with what relief the board chooses to afford. Or, if the board refuses to act in any arguable area, citizens of the states must suffer torts and violations of contract rights without relief. Anent the effect of this decision on state jurisdiction, the four justices concurring in the result said:

"The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in *Russell*, are narrowly circumscribed, those

injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed 775, at 787 and 788, 79 S.Ct. 773.

Referring to the *Gonzales* case, Justice Frankfurter in the second *Garmon* case said:

" \* \* \* However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Asso. of Machinists v. Gonzales*, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed 2d 775, at 782, 79 S. Ct. 773.

Thus, even though the "penumbral area" may be broadened by the *Garmon* decision, the rule of the *Gonzales* case, applicable here, has not been supplanted.

In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs "neither protected nor prohibited" nor "preempted" by federal law, or, more appropriately, by the National Labor Relations Board.

*Morse v. Local Union No. 1058 Carpenters, etc.*, 78 Idaho 405, 304 P.2d 1097, is not applicable here. In that case *Morse*, a member, brought action against the union for damages arising out of loss of employment due to refusal of the union to permit him to transfer from one local to another. The resulting discrimination did not result from a failure to pay dues. Moreover, the opinion in the *Morse* case was handed down more than a year before the decision

of the Gonzales case, hence we did not have the benefit of that, and other later opinions of the federal courts in arriving at the conclusion reached in the Morse case.

We hold that under the rule of the Gonzales case the district court had jurisdiction of this controversy, and that the Garmon case is not in point. *Gainey v. Local 71 International Bro. of Teamsters (N.C.)*, 113 S.E.2d 594; *Barlow v. Roche (D.C.)*, 161 A.2d 58; *Dempsey v. Great Atlantic and Pacific Tea Co.*, 197 N.Y.S.2d 744; *Perko v. Local No. 207 of Int. Ass'n of Bridge, etc., Wkrs., (Ohio)*, 167 N.E.2d 903; *United Association of Journeymen, etc. v. Borden (Tex.)*, 328 S.W.2d 739; *Green v. Folks*, 208 N.Y.S. 2d 559. See also: *Selles v. Local 174, etc. (Wash.)*, 314 P.2d 456, Cert. denied, 356 U.S. 975, 2 L.ed 2d 1149, 78 S.Ct. 1134, rehearing denied, 358 U.S. 860, 3 L.ed 2d 95, 79 S.Ct. 14; *Kuzma v. Millinery Workers Union Local No. 24 (N.J.)*, 99 A.2d 833; *McDermott v. Jamula (Mass.)*, 154 N.E.2d 595; *Cooperative Refinery Asso. v. Williams (Kan.)*, 345 P.2d 709.

The judgment of dismissal is reversed and the cause is remanded for further proceedings.

Costs to appellant.

SMITH, C.J., and KNUDSON, McQUADE and McFADDEN, JJ.,  
concur.

## District Court Memorandum Decision

[Filed December 21, 1962]

. . . . .

This matter is before the Court for its ruling upon paragraphs I, II and IV of plaintiff's motion to strike directed to the answer of defendants filed herein.

The Court's ruling on these paragraphs was reserved after oral arguments, subject to the filing of briefs of the parties. All briefs have now been filed with the Court.

After an examination of the record, including exhibits attached to the pleadings and exhibits and documents produced by interrogatories and discovery, I have concluded that plaintiff's motion should be granted as to paragraphs I, II and IV.

My reasons for so deciding, briefly stated, are these:

With regard to the conclusions of defendants in paragraph VI of defendants' first affirmative defense, I have concluded that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends. The Union's security clause in the contract (Exh. B) merely requires that employees covered by the contract shall remain members of the Union as a condition precedent to continued employment. It is clear that under the terms of the constitution, Section 91, plaintiff was still a member of the Union at the time of the occurrences in question, although not in good financial standing. The agreement (Exh. B) does not authorize defendants to cause plaintiff's discharge for such a condition. I thus conclude this purported defense is sham and should be eliminated at this time so it will not confuse the issues at time of trial.

With regard to paragraph IV, seeking to strike defendants' second affirmative answer and defense, I conclude

that it is also completely sham and irrelevant because it is dealing solely with employee grievances with their employing company, and by its terms it is obvious that it has nothing to do with internal administrative procedures within the Union insofar as it relates to disputes between the Union and its members.

Counsel for plaintiff is requested to prepare a formal order in accordance with this memorandum opinion.

Dated this 21st day of December, 1962.

**MERLIN S. YOUNG**  
*District Judge.*

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**Affidavits Filed With Motion To Alter and Amend Judgment or Order**

[Filed Jan. 24, 1963]

**Allen A. Noel**

I, ALLEN A. NOEL, being first duly sworn, depose and say:

That I am a Vice President of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America;

That on the 1st day of May, 1958 I was the duly qualified and acting Trustee for Division 1055 and as such Trustee for Division 1055 I acted for and negotiated the Working Agreements the said Division had with employers in its jurisdiction, and that among the contracts negotiated for and on behalf of Division 1055 were Contracts "A" and "B", executed as of the 1st day of May, 1958, covering Divisions 7 and 8A respectively of Western Greyhound Lines;

That the language adopted under Section 1, Subsection 3 of Contract "B" did inadvertently omit the words "in good standing," however said clause was interpreted by

myself as Trustee for Division 1055, as well as Western Greyhound Lines, to require membership in good standing in Division 1055 in order for employees to have continued employment with Western Greyhound Lines;

That there was never any intention to set up different rules and regulations for employees of Western Greyhound Lines for Division 8A from rules and regulations covering employees of Western Greyhound Lines in Division 7, inasmuch as employees of Western Greyhound Lines in Division 7 and Division 8A were all members of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1055;

That it was the understanding and belief of myself as Trustee for Division 1055 and the members of Division 1055 that it was a violation of the Labor-Management Relations Act of 1947, as amended, to establish different rules and regulations for members of our Union who were employed by the same company, and that such differentiation of treatment would be an unfair labor practice under the aforesaid National Act as discriminatory treatment was given the members.

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**H. T. Oathes**

I, H. T. OATHES, being first duly sworn, depose and say that:

1. I am the Senior Business Representative of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1055, and was Senior Business Representative of said Division 1055 from June, 1941 to March, 1958. As Senior Business Representative, it was my duty, and I did act on behalf of said Division 1055 in negotiating agreements with employers and that during said period of time I actively participated, and know the agreement, understanding and intention of the parties in each of the contracts referred to below in this Affidavit.

2. Throughout the period I was Senior Business Representative, the employees driving generally South from Portland to Eureka and Redding, now known as Division 7, were covered by collective bargaining contracts, negotiated in general either every year or every two years with Pacific Greyhound. Each of these contracts contained a clause which included the provision that employees, union members at the effective date of the Agreement, and new employees within 30 days of their employment, shall "remain members in good standing as a condition precedent to continued employment with the Company".

3. The employees driving from Seattle east to Spokane and Butte, now in Division 8A, were originally employees of Washington Motor Coach, Inc., and in and after 1947, employees of Northwest Greyhound. These employees were covered by collective bargaining contracts, negotiated in general either every year or every two years. Each of these contracts contained a clause which included the provision that all employees "shall become and remain members of the ASSOCIATION during the life of this Agreement."

I always understood this language as creating the same obligation as in the Division 7 contracts, that the membership must be in good standing. I never made any distinction between employees or members based on the lack of the words "in good standing".

The parties to these contracts never agreed, understood or intended that the word "members" should mean anything different from "members in good standing".

4. The employees driving from Portland east to Salt Lake City, now also in Division 8A, also were covered by collective bargaining contracts negotiated generally every year or every two years, originally with Union Pacific Stages, Inc., and then with Overland Greyhound Lines. Each of these contracts contained a clause which required that members, effective as of the effective date of the agreement, and new employees, originally within 90 days and



since 1950 within 30 days of their employment, shall "become members and remain members in good standing as a condition precedent to continued employment with the Company."

5. Northwest Greyhound Lines took over the operation of the routes and employees referred to in paragraphs 3 and 4 above, so that effective March 2, 1956, an agreement was executed between Northwest Greyhound Lines and Division 1055. In negotiating and reaching this contract, I and both parties worked from the preceding Northwest Greyhound contract, for reasons having nothing whatever to do with the Union security clause and dues requirement, and without any issue being raised by either side as to the continuation of the parties' agreement, understanding and intention that the membership required was membership in good standing.

6. In the agreement of March 2, 1956, there is a provision including the following language:

"All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and shall remain members as a condition precedent to continued employment."

The omission of the words "in good standing" after the word "members" was not agreed, understood or intended to have any significance. Both Division 1055 and Northwest Greyhound Lines agreed, understood and intended that this provision should apply to employees identically as the previous provision. Neither Division 1055 nor Northwest Greyhound Lines intended, understood or agreed that there was any significance or any purpose in the omission of the words "in good standing". The intention, understanding and agreement of both contracting parties, and the only meaning of the words in the contract, is that they mean and must be interpreted as requiring employees to become and to remain members in good standing.



7. In each of the contracts referred to above effective subsequent to the enactment of the Taft-Hartley Act in 1947, the parties agreed, understood and intended the Union security clauses referred to herein as providing Division 1055 with the maximum degree of union security permitted by the Federal Law. Wilson P. Lockridge, the plaintiff in this case, was employed on or about May 16, 1943. He was governed by the contract between Division 1055 and Union Pacific Stages, Inc., and was required to become a member in good standing. He has been governed by the successive agreements in which there was never any intention, understanding or agreement to modify the meaning of the Union security clause or the language contained therein. The language in the 1956 contract with Northwest Greyhound Lines was understood both by Division 1055 and Western Greyhound Lines to mean membership in good standing in the Union for continued employment with the Company.

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**M. C. Frailey**

I, M. C. FRAILEY, being first duly sworn, depose and say:

That on or about the 1st day of May, 1958, I was the Executive Vice President of Western Greyhound Lines, a division of The Greyhound Corporation and as such Executive Vice President I was in charge of contract negotiations representing Western Greyhound Lines;

That I, acting on behalf of Western Greyhound Lines, did negotiate and execute contracts for Western Greyhound Lines including contracts designated "B" and "C" covering Western Greyhound Division 8A and 8B, executed as of the 1st day of May, 1958, as well as Contract "A" covering Western Greyhound Division 7. That the language adopted in respect to the requirement of maintaining membership in the Union in Section 1, Subsection 3 of Contract "B" was understood by all parties not to modify or change the requirements of membership previously required of

Division 8A of Western Greyhound Lines and the contract interpretation of the Union Security Clause covering these employees under predecessor employers;

That by the adoption of the language of Subsection 3 of Section 1 of Contract "B", Western Greyhound Lines understood that membership in the Union, Division 1055, must be maintained in good financial standing in order to meet the requirements of continued employment with Western Greyhound Lines.

DATED this 21st day of January, 1963.

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**Pre-Trial Order**

[Filed January 28, 1963]

The parties to this action, having appeared before the Court at a pre-trial conference on the 25th day of January, 1963, the plaintiff being represented by Samuel Kaufman, Jr. of the firm of Anderson, Kaufman & Anderson, and the defendants being represented by George Greenfield, of the firm of McClenahan & Greenfield, Boise, Idaho, Paul Bailey, of the firm of Bailey, Swink & Gates, Portland, Oregon, and Isaac N. Groner of the firm of Bernard Cushman & Isaac N. Groner, Washington, D. C., the following action was taken, pursuant to Rule X of the Local Rules:

**I**

Defendants' motion entitled "Motion to alter and amend judgment or order," treated by the Court as a motion by defendants to file amended answers, was argued by respective counsel, and after argument denied by the Court.

**II**

The Court ordered that the proposed amended answers of defendants, together with affidavits in support thereof, heretofore erroneously filed by the Clerk of the Court, remain a part of the record of the case.

III

Counsel stipulated that further pre-trial in this matter would be postponed until such time as the Court and counsel mutually agree upon.

Dated this 28th day of January, 1963.

MERLIN S. YOUNG  
*District Judge*

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**Second Amended Complaint**

[Filed March 31, 1965]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Civil No. 30613

WILSON P. LOCKRIDGE, *Plaintiff,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY  
AND MOTOR COACH EMPLOYEES OF AMERICA, an Inter-  
national Labor Union; and NORTHWEST DIVISION 1055  
of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a  
Regional Division of the International Union,  
*Defendants.*

**SECOND AMENDED COMPLAINT**

COMES Now plaintiff above named and for cause of action  
against defendants and each of them, complains and alleges  
as follows:

COUNT ONE:

I

That the defendant, Amalgamated Association of Street,  
Electric Railway and Motor Coach Employees of America,

hereinafter referred to as the International Association, is an organized association having as members various workmen skilled and trained in operating passenger motor busses including those owned and operated by Greyhound Corporation throughout the State of Idaho. That said International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association and the various regional divisions.

## II

That the Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as Division 1055, is a regional division of the International Association and includes as members thereof all members of the International Association who live and work within the regional boundaries of Division 1055. That said Division 1055 has its own duly elected officers but that all members of Division 1055, and the officers thereof, as members of the International Association, are subject to ultimate authority and control of the International Association and are all subject to ultimate authority and control of the International Association and are all subject to the constitution and general laws of the International Association.

## III

That the International Association, through its international officers and officers and agents of Division 1055, have conducted and are conducting businesses within the State of Idaho and at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of said International Association, Division 1055 and the members of the International Association. That many members of the International Association and Division 1055 thereof live in and are employed within the State of Idaho. That the International Association and regional division are the exclusive representatives of all members of the union for

the purpose of collective bargaining relative to conditions of employment and for negotiation and execution of contracts with employers pertaining to such matters, and officers and agents of the International Association and Regional Division 1055 come into the State of Idaho to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of its members. That by the constitution and general laws of the International Association, said association and the regional division in which the member resides are irrevocably authorized to act as agents for all members before any committee, board of arbitration, arbiter, court or any tribunal in any matter affecting members' status as an employee and to represent and bind the members in the presentation, prosecution, adjustment and settlement of grievances, complaints and disputes arising out of the members' employment relationship.

#### IV

That since on or about May 16, 1943 and to and including on or about November 2, 1959, plaintiff was a member of the International Association within the area of Regional Division 1055 thereof, and was employed as a bus driver for Greyhound Corporation, a private corporation having as its main business purpose, the operation of public busses. That all drivers of Greyhound busses, and other public bus lines, are members of the International Association and no person can be employed as a bus driver nor retain such employment unless he is a member of said International Association. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver with Greyhound Corporation and under contracts between the International Union, its regional divisions and Greyhound Corporation, seniority in said employment has commensurate therewith benefits in working conditions and compensation.

#### V

That prior to November 2, 1959, C. A. Bankhead, Treasurer and Financial Secretary of Division 1055, acting for Division 1055 in his official capacity as such Treasurer

and Financial Secretary, and acting for and on behalf of the International Union and the officers thereof, suspended plaintiff from membership in the union on the basis that the plaintiff was in arrears in his payment of dues contrary to the requirements of the constitution and laws of the union and thereafter notified Greyhound Corporation that plaintiff was no longer a member in good standing of the union and requested said Greyhound Corporation to remove plaintiff from employment. That immediately following the receipt of such notice, on or about November 2, 1959, said Greyhound Corporation discharged plaintiff from employment. That plaintiff was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of said Bankhead, aforesaid, were wrongful and without any lawful basis. That additionally, it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof.

## VI

That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of age, earning in his employment an average of approximately \$7,200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future for the next 20 years and until he became 65 years of age, in excess of \$7,200.00 per year, and additionally, at the age of 65 years would have been able to retire with retirement pay of approximately \$3,600.00 per year.

## VII

That in suspending plaintiff from membership in the International Association which resulted in plaintiff's loss of employment, the defendant International Association and Division 1055, acting by and through their duly authorized officers and agents, acted wantonly, wilfully and

wrongfully and without just cause, and, to plaintiff's knowledge, in a manner never before indulged in, and have deprived plaintiff of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience, and plaintiff has been harassed and subject to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

### VIII

That in suspending plaintiff from membership in the International Association as aforesaid, said International Association and Regional Division 1055 thereof, acting through its officers and agents, acted contrary to all custom within said union since, to plaintiff's knowledge, no member of said union, within Region 1055, had heretofore been so suspended for arrears in dues and said International Association and Division 1055 thereof, acting by and through its duly authorized officers and agents, proceeded contrary to the constitution and laws of the International Association and precluded plaintiff from any remedy he may have under said constitution and laws. That nevertheless plaintiff did all things and performed all acts which would have been required of him under the constitution and laws had the International Association and Division 1055 acted in conformance with the requirements of the constitution and laws of the union, but to no avail. That further, any acts on the part of the plaintiff for reinstatement to membership were and would have been useless procedures on his part, it being the attitude of the officers of the International Association and Division 1055 that plaintiff would not be reinstated to membership in the International Association under any circumstances.

COUNT TWO:

### I

Plaintiff repeats and realleges all of the allegations contained in paragraphs I, II, III, IV, V, VI and VIII of Count One.



## II

That section 83 of the constitution and general laws of the International Association provides that no member shall be allowed to injure the interests of a fellow member by undermining him in place, wages or in any other wilful act by which the reputation or employment of any member may be injured. That in wrongfully suspending plaintiff from membership in the International Association, which resulted in plaintiff's discharge from employment with the Greyhound Corporation, the defendant International Association and Regional Division 1055 thereof, acting by and through its authorized officers and agents, acted wrongfully, wantonly, wilfully and maliciously and without just cause and violated the constitution and general laws of the International Association which constituted a contract between the plaintiff as a member thereof and the International Association, and as a result of said breach of contract plaintiff has been deprived of his livelihood and all benefits from his employment with said Greyhound Corporation that have accrued and would accrue to him by reason of such employment, his seniority and experience and plaintiff has been embarrassed and subjected to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, for the sum of \$212,200.00, together with costs and disbursements incurred herein and such other and further relief as to the court may appear meet and equitable in the premises.

ANDERSON, KAUFMAN AND ANDERSON

SAMUEL KAUFMAN

A member of the Firm

501 Idaho Bldg., Boise, Idaho

*Attorneys for Plaintiff*



**District Court Memorandum Decision**

[Filed June 21, 1966]

. . . . .

This matter has been in court since September of 1960. In his original complaint plaintiff sued the defendant unions and Greyhound Corporation. Thereafter plaintiff voluntarily dismissed Greyhound Corporation. This Court thereafter granted the unions' motion to dismiss plaintiff's complaint on the ground that the courts of the State of Idaho lacked jurisdiction because the matter in controversy "arguably" involved unfair labor practices under Sections 7 and 8 of the N.L.R.A., and thus was "preempted." In making this ruling, this Court relied upon *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 Law Ed. 2d 775, 75 Sup. Ct. 772, and *Wax v. International Mailers Union*, 161 A 2d 603 (Pa.). At this same time I denied defendants' motions to dismiss plaintiff's complaint upon the following grounds: That the complaint failed to state a claim; that defendants were not properly served with process; that the Council of Western Greyhound Amalgamated Divisions is an indispensable party to the action; that there has been a misjoinder of causes of action. These rulings stand.

The above order of dismissal of this Court was appealed to the Supreme Court of Idaho and reversed by unanimous decision in March of 1962 (*Lockridge v. Amalgamated Association, et al.*, 84 Idaho 201; 365 Pac. 2d 1006). In doing so, the Idaho Supreme Court said: "We hold that under the rule of the Gonzales case the District Court had jurisdiction of the controversy and that the Garmon case is not in point." The Court was referring to *Association of Machinists v. Gonzales*, 356 U.S. 617, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923.

Following the Idaho Supreme Court decision and after much delay as the result of numerous conferences and

motions, the matter became at issue, and was tried before this Court in October of 1965.

There is very little dispute over the facts. In summary, my opinion is that the plaintiff has established by a preponderance of evidence that the defendants through their officers wilfully and intentionally caused a termination of plaintiff's employment with Greyhound Corporation pursuant to the provisions of a collective bargaining agreement with Western Greyhound Lines, which agreement provided that all employees "shall remain members (of Division 1055) as a condition precedent to continued employment," on the ground that plaintiff was not a member of Division 1055 in good financial standing. However, in fact, at the time of termination of his employment, plaintiff was a *member* of Division 1055 under the terms of the Union Constitution, although he was not in good financial standing because he was one month delinquent in payment of his dues.

Following termination of plaintiff's employment, he made some efforts to seek reinstatement in the union through union procedures. The defendants contend the plaintiff failed to exhaust his internal union remedies, and this alone should be sufficient to bar this action. (87 ALR 2d 1099-1103) While plaintiff could have made a better legal record of his attempts to seek reinstatement through union procedures, I conclude that the facts taken as a whole and the inferences which I believe may legitimately be drawn therefrom indicate that further attempts to follow procedures provided by Section 81 of the Union Constitution would have been futile. The International President Elliott, Charles C. McCaffery, an International Vice President, and E. W. Oliver, a member of the General Executive Board, were aware of and approved of the decision of the Financial Secretary of Division 1055 to ask plaintiff's termination with Greyhound. I am convinced that the true facts are that the defendants' officers were irritated by plaintiff's refusal to go along with a

voluntary dues check-off by Greyhound and, mistakenly believing that they were technically correct, asked plaintiff's termination under the collective bargaining agreement because he was not in good standing. In doing so, they decided to make an example of plaintiff. They have held to such technical position since, although the collective bargaining agreement by its unambiguous terms only requires that plaintiff remain a *member* of defendant union as a condition of employment, as contrasted to a requirement that the employee be a *member in good standing*. Defendants would bind plaintiff to a claimed mutual understanding between the employer and the defendants, apparently arrived at by ESP that the agreement did not mean what it plainly says. Likewise they ignore the custom and tradition of tolerance by the union of such short term delinquency.

Likewise, I conclude that to pursue grievance procedures against Greyhound Corporation, as provided in the collective bargaining agreement, would be an application of the grievance procedure to a situation which was never intended to be covered by it. The dispute herein, under the pleadings and theories of the case accepted by the Idaho Supreme Court, lies between defendants and plaintiff, or between the union and its member, and not between an employer and its employee. Defendants urge the rule in the case of *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 Sup. Ct. 614, which requires that an employee pursue grievance procedures before suing in court for contract benefits provided under a collective bargaining agreement. The factual situation here is very different from *Maddox*.

Thus, although I have not spelled out my findings in detail, I find that the allegations of Paragraphs I, II, III, IV, V and VIII of plaintiff's second amended complaint are sustained by a preponderance of the evidence and well state the ultimate facts which have been proved in this case.

In view of foregoing holding, except for the question of damages, which will be discussed hereafter, the only remaining issue is the legal one of whether under the above stated findings this court or any state court has jurisdiction of the issues involved in this case. Although the pleadings have been amended rather substantially, the pre-emption issue is the same as it was when this matter first went to the Idaho Supreme Court. I think defendants' position on this issue is greatly reinforced by *Plumbers' Union v. Borden*, 373 U.S. 690, 10 L. Ed. 2d 638, 83 Sup. Ct. 1423; *Iron Workers v. Perko*, 373 U.S. 701, 10 L. Ed. 2d 646, 83 Sup. Ct. 1429; and *Day v. Northwest Division 1055, et al.*, 238 Ore. 624, 389 Pac. 2d 42. Plaintiff continues to claim that he is entitled to damages for injury to his employment as distinguished from remedies for loss of union rights; nevertheless, I feel that I have been virtually directed by the Idaho Supreme Court to decide this case on the theories of "Gonzales," and I must consider that decision the law of this case. In *Gonzales*, the plaintiff primarily sought reinstatement in the union so he could work on union construction jobs. Damages were incidental to this relief. The same relief would under the theories of plaintiff in this action afford him the major part of his remedy.

I thus conclude that although plaintiff has never sought such remedy, he is entitled to restoration of his membership in defendant unions upon payment of current dues, and in addition he is entitled to actual damages suffered as a result of loss of membership from the time of its wrongful termination to its restoration.

The record does show that his loss of membership did deprive him of employment with Greyhound and other bus driving jobs. He was not equipped by education or experience to find other employment with a comparable income. Using the earnings of Greyhound driver Francis Carter who took plaintiff's place on the seniority list as compared to plaintiff's earnings as shown by his income tax returns between November 3rd, 1954, to September 15,

1965, I find the plaintiff's actual damages resulting from loss of his driving job with Greyhound have been \$32,678.56. This amount was computed as follows:

<u>YEAR</u>	<u>CARTER</u>	<u>PLAINTIFF</u>
1959	\$ 6,017.57	\$ 5,014.38
1960	6,750.27	489.40
1961	7,410.50	258.00
1962	7,213.63	350.00
1963	8,093.61	2,185.00
1964	8,265.59	5,000.00
1965 (Through Sept. 15)	6,185.74	3,961.50
<b>TOTAL</b>	<b>\$49,936.84</b>	<b>\$17,258.28</b>

However, I conclude the plaintiff is not entitled to future damages arising from continued loss of employment with Greyhound because "Gonzales" and the theories thereof contemplate that restoration of union membership will afford full relief and allow his reemployment at the same job. However, I further find that plaintiff is entitled to accruing damages at the rate of \$3,500.00 per year until membership in the union is fully restored. Although plaintiff will theoretically lose seven years of seniority with Greyhound, I have no way of computing the value of said loss. Likewise the monetary value of any retirement and insurance benefits lost during this period has not been established.

I further conclude that plaintiff is not entitled to punitive damages against defendants. I do not find their acts wanton and willful or oppressive to the extent which has been required in the past by Idaho decisions; and, as indicated above, I believe that the union, although it wished to punish the plaintiff for refusing to go along with the check-off, did believe it was technically on sound legal ground in requesting his termination. Likewise, it is my opinion that the plaintiff is partially at fault for his predicament because he did not pursue certain remedies which I think were available to him. He might have sought

a restoration of his membership pendente lite through court order, or through N.L.R.B. action. Although counsel for plaintiff obviously feels otherwise, I do not believe that it can be assumed that the N.L.R.B. would have acted unfavorably to plaintiff had he made application to it and had all the facts been fully presented to it. What Day presented has never appeared.

Counsel for plaintiff is requested to prepare findings of fact, conclusions of law and judgment for my signature in accord with this decision. If counsel for defendants wish to object to any findings or conclusions of law, I ask that they follow Rule 52(b) I.R.C.P.

Dated this 21st day of June, 1966.

MERLIN S. YOUNG  
*District Judge.*

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**District Court Memorandum Decision and Orders on Motions  
To Amend Findings of Fact, Conclusions of Law and  
Judgment**

[Filed September 1, 1966]

• • • • •  
This matter is before me upon motions to amend findings of fact and conclusions of law filed by both plaintiff and defendants.

By paragraphs I, II, and III plaintiff asks the Court to award greater damages than found in my memorandum decision. The actual damages suffered by plaintiff are basically speculative in a case of this kind and at best can only be an estimate. Plaintiff dropped his earlier claims for punitive damages in his last amended complaint, a fact which I overlooked in my memorandum decision, but I presume it was done to avoid any inference that his claim is based in tort for wrongful interference with his employment. It is difficult for me to see how claims for embarrassment, discomfort, and mental distress could be

considered to have been within the contemplation of the parties at the time plaintiff entered into his union membership contract. In any event, I did consider most of the elements suggested by plaintiff and did arrive at the conclusion that under all of the circumstances the difference between plaintiff's actual income and his substitute offered a fair and realistic measures of damages. Therefore, plaintiff's requested amendments I, II, III and IV are denied.

By request V plaintiff asks this Court to direct defendants to restore plaintiff to membership with full restoration of seniority in union membership from 1943. In his motion plaintiff says, "Even the N.L.R.B. awards full restoration of seniority where restoration of employment is ordered." From this, I gather that plaintiff believes that by this decision I am ordering plaintiff restored to his employment with his former employer Greyhound. If it be so interpreted, I believe this Court would then clearly be in excess of its jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the "Borden" and "Perko" decisions. I do not have any jurisdiction over his employer-employee relationship in this action. It is my opinion that at most I can restore to him his union membership as of the date of its wrongful termination. In this I am attempting to follow "Gonzales" as I understand it. I therefore will deny request No. V.

By paragraph VI of his motion to amend, plaintiff seeks to strike the whole provision providing for future annual payments upon refusal to restore plaintiff to membership and to substitute a fixed sum based upon plaintiff's life expectancy and the differences in pay and retirement he might have received from Greyhound as compared to his present employer. As I indicated at the oral argument, I have concluded that the future penalty provision was an error and not authorized under the theory of "Gonzales" or any other theory of law. I will therefore deny plaintiff's requested amendment VI, but will strike Paragraph



XIII from the findings of fact, the parts of conclusions of law and judgment referring to such future damages.

Plaintiff's Request VII is granted.

Considering defendants' motion to amend, I conclude that overall the record does support a finding that the union had in the past been tolerant of late dues payment and that the findings are not too far out of line in that regard; and the defendants' international officers knew of and condoned the actions of Bankhead. Therefore Paragraphs I and II are denied. I will grant Paragraph III to the extent that everything after the word "Court" in Line 5 of Conclusion I will be stricken. All other requests of defendants will be denied except that "all customs and" in Line 7 of Paragraph III of the conclusions of law will be changed to "past." Paragraphs IV, V, and VI of defendants' motion are denied.

I have made the above amendments by interlineation on the original document. Copies of the portions which have been altered are attached for counsels' information.

It Is So ORDERED.

Dated this 1st day of September, 1966.

MERLIN S. YOUNG.  
*District Judge.*

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**District Court Findings of Fact, Conclusions of Law and  
Judgment (as Amended)**

[Filed September 1, 1966]

• • • • •  
The above entitled cause came on regularly to be heard before the court sitting without a jury on the 11th day of October, 1965, plaintiff appearing in person and by Samuel Kaufman of the firm Anderson, Kaufman and Anderson, his attorneys, and defendants appearing by counsel, Isaac N. Groner, Paul T. Bailey and George A. Greenfield.



Whereupon, following submission of oral and documentary evidence, counsel presented oral argument and written briefs and the court being now fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, as follows:

## FINDINGS OF FACT

### I

That defendant Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as the International Association, is an organized labor association or union having as members workmen connected in some manner with the operation of trolleys, busses and coaches, including those skilled and trained in driving the same and particularly, as concerns this case, busses owned and operated within the State of Idaho by Western Greyhound Lines, a division of Greyhound Corporation. That said International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association who in turn are grouped within various regional divisions.

### II

That Northwest Division 1055 of the International Association, hereinafter referred to as Division 1055, is one of the regional divisions of the International Association and includes as members thereof members of the International Association who live and work within the regional boundaries of Division 1055 which includes portions of the State of Idaho. That said Division 1055, and the officers thereof, are members of the International Association, subject to ultimate authority and control of the International Association within the framework of the constitution and general laws of the Association (Exhibit 34) to which they are all subject.

## III

That the International Association, through its International officers and through officers and agents of Division 1055, and Division 1055 itself, through its officers and agents, have each conducted and are conducting business within the State of Idaho. That at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of the International Association, Division 1055 and the members thereof. That a number of members of the International Association and Division 1055 thereof live in and are basically employed within the State of Idaho and the International Association and Division 1055 are the exclusive representatives of said members for the purposes of collective bargaining relative to conditions of employment and for negotiation and execution of contracts with employers pertaining to such matters, some of which employers are within the State of Idaho, and officers and agents of both the International Association and Division 1055 come into the State of Idaho to conduct internal union affairs and to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of the members of said International Association and Division 1055.

## IV

That plaintiff is a man of the approximate age (at time of trial) of 51 years, married and with two children, both of whom, at time of trial had reached the age of majority. Plaintiff did not complete high school and has no educational or experience background to qualify him to do much else than drive a bus or other similar motorized vehicle and has a physical disability of the back resulting from an accident driving a bus prior to 1959, which disability curtails plaintiff's activities in other fields involving physical labor.

## V

That since on or about May 16, 1943, and to and including on or about November 2, 1959, plaintiff was a member of the International Association within Division 1055 thereof and has continuously been employed as a bus driver for Western Greyhound Lines, or its predecessors. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver and under the laws of the union and the employment contract, Exhibit 35, such seniority commensurate rights and benefits in working privileges and compensation to be received therefrom. Exhibit 35 comprises actually two contracts, Contracts B and C, but the contract covering plaintiff's employment and which is pertinent in this case is Contract B, being the appropriate first half or the white pages of Exhibit 35.

## VI

That on or about November 2, 1959, C. A. Bankhead, treasurer and financial secretary of Division 1055, acting in his official capacity and within the scope of his activities as treasurer and financial secretary and, under the facts presented and all reasonable inferences to be drawn therefrom, acting for the International Association and pursuant to knowledge and approval of, if not direct advice and orders from, the International Association President, and International Vice-President, and a member of the General Executive Board of the International Association, suspended plaintiff from membership in the union on the sole grounds that plaintiff was in arrears in payment of dues contrary to the requirements of the constitution and general laws of the union (Exhibit 34) and by letter dated November 2, 1959 (Exhibit 4) notified the employer, Western Greyhound Lines, that plaintiff was no longer a member in good standing in the union and requested said employer to remove him from employment. That immediately following receipt of such notice from C. A. Bankhead, the employer discharged plaintiff from employment (Exhibits

8 and 9). One Elmer Day was likewise suspended under identical circumstances.

## VII

That the contract agreement (Exhibit 35), and particularly paragraph No. 3a of Section I, on page 5, requires that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to continue employment. Section 91 of the Constitution of the International Association (Exhibit 34) provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and further, where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership in the association, meaning the International Association. Said Section 91 further provides that where agreement with employing companies provides that members must be in *continuous good financial standing*, the members in arrears one month *may* be suspended from membership and removed from employment. Section 93 of Exhibit 34 provides that where members are in arrears past the last day of the second month they shall, at the last meeting of each month, be reported by the financial secretary as having suspended themselves from membership except where members are suspended in compliance with the terms of agreements, the members *may* be so reported and suspended after the period of one month. That at the time of their suspension from membership in the International Association on or about November 2, 1959, plaintiff and said Day were in arrears in payment of their dues only since the 1st day of October, 1959. Additionally, it has over the years been customary within Division 1055

for members to be in arrears in their dues without being suspended, even though said arrearages exceeded 60 days, it being the custom of Division 1055 in the past, and almost without exception, to remove the delinquent member only from service rather than suspend him from union membership and immediately upon payment of his delinquent dues, put him back in service without loss of seniority. Additionally, the financial secretary of Division 1055 did not report at the last meeting prior to suspension, that plaintiff or Day were in arrears in dues.

### VIII

That at the time plaintiff's wife was notified of plaintiff's suspension from union membership in early November 1959 (plaintiff was elk hunting during a vacation period), plaintiff's wife, by letter dated November 10, 1959, submitted to C. A. Bankhead, financial secretary of the Division 1055, a check to cover plaintiff's dues for both October and November, but the said C. A. Bankhead refused to accept the same and the check was returned (Exhibit 5).

### IX

Following his return to Boise in mid-November 1959, and immediately upon learning of his suspension from union membership with resulting termination of his employment, plaintiff contacted C. A. Bankhead requesting advice as to what he could do to obtain reinstatement of his union membership and on several occasions submitted checks for his arrearages and penalties all of which were refused. On one occasion during November 1959, another driver and fellow member tendered dues for plaintiff to Bankhead who was told not to accept the same by International Vice-President Charles McCaffery. While the said Bankhead suggested to plaintiff that he write to the International President, which plaintiff delayed in doing until January 8, 1960 (Exhibit 11) said Bankhead himself wrote to the International President (Exhibit 6) requesting

that the International President and/or the General Executive Board waive the provisions of Section 94 of the Constitution and reinstate plaintiff. This was not done and subsequently there evolved correspondence between Plaintiff and the International President and others (Exhibits 10, 11, 12, 13, 14, 15, 16, 17) as well as oral conversations between plaintiff and other union members on his behalf and officers of both Division 1055 and International Vice-President McCaffery.

## X

That at the time of his suspension from union membership, plaintiff was 46 years of age. In 1959 he earned \$5,014.38 from his employment although he did not work the full year. Upon plaintiff's suspension from union membership, the next driver in seniority, one Francis Carter, moved up in the seniority list and in effect, took plaintiff's place on that list. The comparable earnings of said Carter and plaintiff for the period 1959 through September 15, 1965, are as follows:

<u>YEAR</u>	<u>CARTER</u>	<u>PLAINTIFF</u>
1959	\$ 6,017.57	\$ 5,014.38
1960	6,750.27	489.40
1961	7,410.50	258.00
1962	7,213.63	350.00
1963	8,093.61	2,185.00
1964	8,265.59	5,000.00
1965 (Through Sept. 15)	6,185.74	3,961.50
TOTAL	\$49,936.84	\$17,258.28

That during the past several years the said Carter has, by reason of his seniority, been able to bid and hold a regular run. That in addition thereto, had he chosen to do so, he could have worked what is known as the extra board, which is the customary practice of other drivers, but which Carter chose not to do for personal reasons. The evidence discloses that for the years 1963 and 1964, the said Carter, working the extra board, could have earned at

least \$1200.00 a year more than he chose to and commencing 1965, any driver with such seniority could earn at least \$10,000.00 per year.

## XI

That following his suspension from union membership in November 1959, plaintiff was without steady employment until after mid-1963 when he obtained employment with the State of Idaho Highway Department which necessitated his moving from Boise Valley to Lowman, Idaho, where he has resided since. Until his employment with the State of Idaho Highway Department in 1963, plaintiff made many efforts to seek employment within the limits of his educational, experience and physical abilities and his lack of earnings during that period are not due to failure of effort on his part.

## XII

Plaintiff's present wages with the State of Idaho Highway Department are approximately \$5,300.00 per year. That in addition to a difference in earnings of approximately \$4,700.00 per year, various insurance and burial benefits from employment as a bus driver considerably exceed that which are available to plaintiff as an employee of the State of Idaho Highway Department although these cannot be translated into dollars and cents. In addition, under retirement plans with Western Greyhound Lines, plaintiff would be able to retire between ages 60 and 65 with a retirement income of at least \$300.00 per month and his present retirement benefits under the State of Idaho Public Employee Retirement law entitles him to approximately \$50.00 per month retirement. Plaintiff's life expectancy at time of trial is approximately 23 years.

## XIII

That as a result of his suspension from union membership plaintiff has suffered embarrassment, discomfort,



mental anguish and humiliation and additionally a financial loss in earnings to September 15, 1965 in the sum of \$32,678.56.

## CONCLUSIONS OF LAW

### I

That each of the defendants, International Association and Division 1055 are the proper parties defendant in this action, have done and are doing business within the State of Idaho, were duly and properly served with summons and complaint herein and are properly within the jurisdiction of this court.

### II

That the Constitution and general laws of the International Association (Exhibit 34) as well as the contract agreement (Exhibit 35) are, with respect to plaintiff's requirement for paying dues and his suspension from membership in the union for failure to pay dues, clear and unambiguous in their terms. That the contract, Exhibit 35, requires only that plaintiff remain a member of the Association and Section 91 of the Constitution therefore does not provide for suspension from union membership until plaintiff be arrears in his dues past the last day of the second month. That on November 2, 1959, plaintiff was in arrears in his dues only two days past the first month and his suspension from union membership was wrongful.

### III

That even where employment contracts provide that the union member remain in good financial standing, as opposed to merely being a member of the union as is the requirement of Exhibit 35, suspension from union membership after 30 days delinquency is not mandatory but discretionary and any suspension of a union member for dues delinquency after 30 days violates past practice of Division



1055. That in suspending plaintiff from union membership officers of Division 1055 did not conform to the procedural requirements of the Constitution nor to the customs and practices of Division 1055 and at all times acted with knowledge and consent of, if not direct orders from, officers of the International Association.

#### IV

That while plaintiff might have made a better legal record of his attempts to seek reinstatement through union procedures, particularly Section 94 of the Constitution, the facts, taken as a whole, together with all reasonable inference which may be legitimately drawn therefrom, indicate that any further attempts on plaintiff's part to seek reinstatement or to follow other procedures such as provided in Sections 79-81 of the Constitution, the proper application of which in this instance is doubtful, would have been useless and futile gestures.

#### V

The grievance procedures set forth under Section 1, paragraph 3 and following of Exhibit 35 are of no proper application in this instance and are intended to cover grievances existing between an employee and employer and not internal problems existing between the union member and the union such as in this case.

#### VI

That the Constitution and Bylaws of the International Union constitute a contract between the union and the members thereof and in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and contrary to all custom within Division 1055, defendants, whose officers and agents acted in concert, violated said contract.

## VII

That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and resulted in a wrongful interference with plaintiff's employment, occupation and livelihood and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish.

## VIII

While plaintiff did not seek such remedy, he is entitled to all relief warranted by the evidence and the court concludes that plaintiff should be granted judgment for damages of \$32,678.56 for loss of earnings to September 15, 1965, and for full restoration of union membership upon payment of current dues.

## JUDGMENT

WHEREUPON, upon the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover judgment against defendants, and each of them, for the sum of \$32,678.56, together with interest thereon at the rate of 6% per annum until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants restore plaintiff to membership in the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, an International Labor Union, and Northwest Division 1055 thereof upon his tender of current dues.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT THE plaintiff do have and recover his costs incurred herein in the sum of \$365.55.

Dated this 1st day of August, 1966.

MERLIN S. YOUNG.  
*District Judge.*

Judgment amended by the Court on Sept. 1, 1966, as shown by additions and deletions shown thereon [deleted from this printing].

MERLIN S. YOUNG.  
*District Judge.*

**Reporter's Transcript****October 11, 1965**

• • • • •  
 [1] **APPEARANCES:** For the Plaintiff—Samuel Kaufman, Jr., of the firm of Anderson, Kaufman & Anderson, Boise, Idaho.

For the Defendants—George Greenfield, of the firm of McClenahan & Greenfield, Boise, Idaho

Isaac N. Groner, Washington, D.C.

Paul Bailey, of the firm of Bailey, Swink, Hess & Lansing, of Portland, Oregon.

• • • • •

**Wilson Philip Lockridge****Direct Examination**

• • • • •  
 [36] Q. On or about August 20th [1959], or shortly thereafter, did you receive a communication from Mr. Bankhead in the nature of a form letter, which is marked here as Exhibit 1? A. Yes, I received one.

• • • • •

[37] Q. Mr. Lockridge, I'll ask you if shortly following October 22nd, 1959, you also received from Mr. Bankhead the letter dated October 22nd, 1959 addressed to you at Kuna, Idaho re your September, 1959 dues, marked Plaintiff's Exhibit 2? A. Yes, I received it.

• • • • •

Q. Mr. Lockridge, at the time you received that letter had you paid your September, 1959 union dues? A. Yes, I had.

Q. When you got the October letter? A. Correction; no, I hadn't paid by that time.

Q. Were the dues for the month of August, 1959, and all prior months up to that, paid? A. Yes.

Q. But you had not paid your September dues; is that correct? A. That is correct.

Q. And as shown by this exhibit, Mr. Bankhead was writing you concerning your September dues, was he not?

A. Yes, he was.

[38] Q. Mr. Bankhead advised you to have those dues paid by October 28th, and did you get your September, 1959 dues paid on or before October 28th, 1959? A. Yes, I did.

Q. Do you recall how they were paid? A. I gave the money to Harold Oathes, and he took it in to the office in Portland.

Q. Did Mr. Bankhead issue you a receipt for those dues? A. Yes, he did.

Q. I show you Plaintiff's Exhibit 3, being a receipt dated October 26, 1959 for \$6.50, union dues for September, 1959 signed by C. A. Bankhead; is that right? A. Yes.

Q. Had you yet paid your October dues, Mr. Lockridge? A. The October dues were paid by my wife.

Q. Well, I am talking now, when you got the receipt from Mr. Bankhead for your September dues, had you yet paid your October dues? A. No.

Q. Did you take a vacation that year? A. Yes, I did.

Q. When did that start, do you recall? A. About the first of November.

Q. About how long was your vacation? A. About twelve days.

[39] Q. Where did you go? A. Elk hunting.

Q. Where? A. In Northern Idaho.

Q. When did you leave to go elk hunting? A. It was about the 1st of November.

Q. Do you recall about when you returned? A. It was either the 11th or 12th of November.

Q. On your return was there, at your home at Kuna, a copy of a letter dated November 2nd, 1959 from Mr. C. A.

Bankhead to Mr. Egger, Regional Manager of Western Greyhound Company, stating that you and a Mr. Elmer Day were not in good standing in the union, and asking that you be removed from employment? Did you receive a copy of that which I hand you marked Exhibit 4? A. Yes, I did.

Q. Prior to that time, had you ever received any communications from Mr. Bankhead concerning your October dues, similar to Exhibit 2 which he wrote to you concerning your September dues? A. No, I didn't.

[40] Do you know whether, Mr. Lockridge, prior to your return, your wife did in fact send a check in to Mr. Bankhead to cover union dues for the months of October and November, 1959?

A. Yes, she did.

Q. Subsequently on November—or shortly after November 13th, 1959, did a letter come to your house directed to Mrs. Lockridge from Mr. Bankhead returning the check she had sent to him and indicating that it could not be accepted, as shown by Exhibit 5? A. Yes, that is correct.

[41] Q. Mr. Lockridge, following your return from the hunting trip and being advised that Mr. Bankhead had sent Mr. Egger the letter Exhibit 4, what did you do? A. I talked to Mr. Bankhead on the phone.

Q. And do you recall the essence of what the conversation was? A. Well, he told me to write a letter to Mr. Elliott.

Q. Did he advise as to the procedure you should follow? A. Yes, he did.

Q. What procedure did he indicate that you should undertake then, with regard to any particular section of the

Constitution, if any? A. I don't recall the exact words that he used.

Q. Well, I realize this has been a long time ago, but in essence, can you recall what it was that he advised you to do, or what constitutional procedures you should follow, if any? A. I'm sorry, I don't recall.

Q. You don't recall the exact advice he gave you, but did you in effect follow whatever advice he gave you? A. Yes, I did.

. . . . .  
[42] Q. Did you get a copy of a letter from Mr. Bankhead, of a letter he wrote to Mr. Elliott on November 24th, 1959, which is Exhibit 6? A. Yes, I did.

. . . . .  
[43] Q. Now, over the period of the next several months, did you make any further attempt to send money in as payment of your dues, of any kind or substance in connection therewith? A. Yes, I did.

Q. By check? A. Yes.

Q. Were those checks sent to Mr. Bankhead by you or through some other person? A. Yes, they were.

. . . . .  
**Plaintiff's Interrogatories and Defendants' Answers**  
. . . . .

[110] Mr. Kaufman: Interrogatory No. 1. Are not all members of Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America members of the International Union?

The answer as submitted: Defendants and each of them object to interrogatory No. 1 on the grounds and for the reason that said interrogatory calls for a legal conclusion by way of answer.

Subsequently, following a hearing on a motion to compel answer to Interrogatory No. 1, the answer was as follows: No, in that members of Northwest Division 1055 are mem-

bers of that Division only and that Division 1055 is a local union chartered by The Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America and that said Amalgamated does not have individual members as such.

Interrogatory No. 2. Is not Northwest Division 1055 merely a regional division of the International Union? The original answer was an objection, and following ruling by the Court, it was answered as follows:

No, in that Northwest Division 1055 is not, in a legal sense, a regional division but is a chartered local union of the International.

Interrogatory No. 3. Are not the Constitution and Bylaws of the International Union, [111] being Exhibit B attached to defendants' answer in this case, binding upon all members regardless of which division they are members of? Objection was made that this calls for a conclusion, and this was sustained.

Interrogatory No. 4: Do not some members of the International Union within Northwest Division 1055 live and work in Idaho? Following objection and ruling thereon, that was answered as follows:

No, in that the International Union does not have members as such and only charters divisions as local unions of the International.

Interrogatory No. 5: It is alleged in paragraph VI on page 3 of defendants' answer that notice was given to plaintiff by defendant Division 1055 that plaintiff would be in arrears in his dues if they were not paid prior to November 1, 1960. Attached hereto marked Exhibit 1 is a letter from C. A. Bankhead, Financial Secretary of Northwest Division 1055, dated October 22, 1959, and directed to plaintiff. Is this the notice referred to in paragraph VI of the answer? The answer to that interrogatory is No.

Interrogatory No. 6: If the attached Exhibit 1 is not the notice referred to, was the notice so referred to in



writing or oral? What date was the notice given? By whom was it given? The reply to the interrogatory:

In reply to interrogatory No. 6 [112] defendants' answer is that notice was given both in writing and orally, by letter dated August 20, 1959 and by oral statement to the individual acting as agent for plaintiff on October 26, 1959, both of these notices given by C. A. Bankhead.

Interrogatory No. 7: At the time notice was given to plaintiff for what month or months was he purportedly delinquent in his dues? In reply to interrogatory No. 7 notice was given on October 26th plaintiff was delinquent for the month of October.

Interrogatory No. 8: If the notice was not Exhibit 1, what delinquent month or months were referred to in the notice given?

Answer: Defendants and each of them object to response to interrogatory No. 8 on the grounds that said interrogatory requires the same answer as given in interrogatory No. 7, which is heretofore answered.

Interrogatory No. 9: Were not the dues of Wilson P. Lockridge for the month of September 1959 paid by him or on his behalf on October 26, 1959? The answer is Yes.

No. 10: Did not Mr. Bankhead issue receipt No. 5701 dated October 26, 1959, to W. P. Lockridge acknowledging receipt of \$6.50 covering union dues for September 1959? The answer is Yes.

No. 11: On November 2, 1959, was not Mr. Lockridge delinquent in his dues for only [113] one month, being October 1959? Answer No.

• • • • •

### Stipulation

[117] MR. KAUFMAN: Now, several things for the record. It is stipulated and agreed that Exhibit 35 is actually two agreements, and that the agreement pertinent to Mr. Lockridge is the Contract B, which is the white portion of the exhibit—the white paper.

MR. GRONER: Your Honor, pertinent is a legal conclusion, so we couldn't stipulate as to that.

MR. KAUFMAN: Well, it's the Agreement under which Mr. Lockridge was employed; the white portion of this exhibit.

[118] MR. GRONER: Yes, we will stipulate as to that.

THE COURT: All right.

**Deposition of Clarence A. Bankhead**

[122] Q. And you sent that letter certified mail to Mr. Lockridge? A. Yes.

Q. You sent a similar letter certified mail to Mr. Elmer Day, did you not? A. Yes.

Q. Right. You had other union members besides Mr. Anderson even who did not pay dues for more than 30 days who were never suspended from the Union, didn't you?

[123] A. Yes.

Q. Mr. Day and Mr. Lockridge were the only two suspended from the Union for non-payment of dues, were they not? A. Yes.

*October 12, 1965*

[128] Q. Weren't they? Nobody ever suspended Mr. Rainesberger because he was delinquent on five different occasions or more; nobody ever suspended Mr. Sharon because he was delinquent; nobody ever suspended Mr. House because he was delinquent; yet Day and Lockridge were suspended and they are two of the five people who had objected to the checkoff; and so they were not singled out? A. Well, I didn't feel they were singled out.

[138] Q. Other people had been delinquent and not been suspended; that is fact, isn't it? A. That is a fact.

## WILSON PHILIP LOCKRIDGE

## CROSS EXAMINATION

. . . . .  
[182] Q. During any of this period of time—and I am speaking of the time you were suspended up until date—have you ever applied at Greyhound for employment?  
A. No, I didn't.

. . . . .  
Q. Now, Mr. Lockridge, in the period of 1959 when you were working for Greyhound, do you recall whether or not you signed a petition in respect to the dues checkoff?

MR. KAUFMAN: I will object to that as irrelevant and immaterial.

MR. BAILEY: You have already brought that letter in—

THE COURT: Overruled. I think it touches on his deposition.

A. There were petitions circulating around Pendleton about that time.

Q. Did you sign one? A. I might have signed one. I don't recall.

Q. Do you know whether or not Mr. Casey Tanner, acting upon such an assumption or request for refund of your dues from [183] Greyhound.

MR. KAUFMAN: To which I will object as irrelevant and immaterial, your Honor.

THE COURT: Overruled.

A. I don't recall having Mr. Tanner to do that.

Q. Do you recall whether or not Mr. Tanner forwarded to you the sum of \$6.50 which was indicated as your dues for the month of September, 1959? A. Yes.

Q. You received that? A. Yes.

Q. Do you recall approximately when you received it?  
A. I don't remember the exact date on that, no.

Q. Now, when you received that check, did that money—and it was for the month of September—did you not know then that your September dues were not paid? A. Yes.

Q. Did you also know that your dues would be from that time forward not checked off by the employer? A. Yes.

Q. Did you know then that it was your responsibility personally to make these payments of these dues, subsequent to that time? A. Well, I figured I had until the last of—

Q. Answer the question; then you can talk about your answer, but I asked you if you knew it was your responsibility? A. Yes.

. . . . .  
[193] Q. Did you make any other attempt to any other source to rectify this situation and get yourself back on the job? A. Yes, I did. I talked to Mr. Robinson with the Department of Labor.

Q. Department of Labor where? A. Here in Boise.

[194] Q. Is that a Federal department, or State? A. I really don't know.

Q. Did you check with the National Labor Relations Board at any time in this respect? A. I heard earlier that it wasn't under the jurisdiction of the Labor Relations Board.

Q. Who told you that? A. I can't recall who told me.

Q. When did you hear that information? A. That was shortly after I was suspended.

Q. How long after? A week, a month? A. Oh, I believe it was near a week.

Q. You don't know who told you that? A. I don't remember, no.

. . . . .  
[203] Q. Mr. Lockridge, you testified that some other persons, drivers had become delinquent in their dues, did you? A. Yes.

Q. And were they discharged, or suspended from membership and discharged? A. Only one, that I can remember.

Q. Who was that? A. That was Elmer Day and I.

Q. Just two of you? A. Yes.

Q. Do you feel they have treated you differently than they have others, then? [204] A. Probably they sort of singled us out.

Q. Do you understand what the word discriminate means? A. I probably don't understand it.

Q. Mr. Lockridge, in your deposition, taken on December 30th, 1962, on page 131, questions proposed to you by Mr. Kaufman, he was asking the question, commencing at the top of the page:

Question. To your knowledge were you and Mr. Day treated differently in being suspended for an alleged delinquency in dues than other people who you have heard of were also delinquent in dues?

Answer. Yes, I believe we were singled out.

Question. And while the reason for your suspension was as you have testified, a delinquency in the payment of dues, to your knowledge were you and Mr. Day singled out for any reason?

MR. KAUFMAN: I will object to that, going into the record, or at least any proposed answer to that last question, going into the record, on the grounds it goes beyond the issue in this case, the sole issue in this case is whether his dues were paid and whether he was rightfully suspended for non-payment of dues.

THE COURT: Overruled. I think there is a broader issue than that, Mr. Kaufman.

MR. KAUFMAN: Their answer, your Honor, doesn't set forth that he was suspended for any reason other than non-payment of dues.

THE COURT: I'm going to overrule the objection.

[205] Q. Continuing: Answer. Well, I believe we were sort of branded as trouble makers.

Q. Now, I ask you, Mr. Lockridge, were those statements that you made in response to questions by Mr. Kaufman at

that time accurate? A. Well, I can't recall that I was ever in any trouble as a trouble maker.

Q. At the time you made this statement in your deposition, was this a correct answer in respect to the response to that question? A. I suppose I felt that way at that time.

• • • • •  
**Deposition of Clarence A. Bankhead.**  
• • • • •

[261] Question. Now, look at that again, "Where agreement with employing companies provide that members must be in continuous good financial standing." The 30-day provision applies. Again I ask you with regard to Contract B, where in contract B it states anything about good continuous financial standing? Answer. The words aren't in there.

• • • • •

Question. I am asking about the suspensions. Mr. Lockridge and Mr. Day were suspended because they were part of that group; had they not been there wouldn't be any suspension, would there? Answer. They were suspended because they were delinquent in their dues.

• • • • •

**Plaintiff's Exhibit**

AMALGAMATED ASSOCIATION OF  
STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA  
AFL-CIO  
Division 1055

1111 S.W. Fifth Avenue

August 20, 1959 Portland 4, Oregon

Mr. Wilson P. Lockridge  
Kuna  
Idaho

Dear Sir and Brother :

Recently, the Western Greyhound attention the fact that you do not have brought to our Company a written authorization for on deposit with the dues and assessments. the deduction of your

We have checked the records on file find no such written authorization signed in our office, and we convenience, we are again enclosing it by you. For your Card for check-off of dues and Special Authorization please sign this card and return it to us. Assessments. Will you than August 28, 1959. Division 1055 no later

Without such written authorization, the Western Greyhound Lines will not withhold dues, the Western Greyhound your wages. This will require payment of dues and assessments from and assessments directly to Division 1055 by you of your dues

Our labor contract with Greyhound Lines requires, as a condition precedent to your continued employment with Greyhound, that you maintain membership in good standing in Division 1055. Section 91 of our General Constitution and laws provides, in part, as follows:

"Where agreements with employers require that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with the terms of the agreement."

In the event you do not maintain your membership in Division 1055 as specified above, we will be required to have you dismissed from service with Greyhound. To make easier your payment of dues, we therefore urge you to sign the enclosed Authorization Card and return it to Division 1055 immediately.

Fraternally,

C. A. Bankhead  
Financial Secretary

CAB/dh

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**Plaintiff's Exhibit 2**

October 22, 1959

Certified No. 409304

Re: Your September, 1959 Dues

Mr. Wilson P. Lockridge  
Kuna  
Idaho

Dear Mr. Lockridge:

By letter dated August 11, 1959, Mr. K. C. Tanner gave notice to Mr. James C. Dezendorf, attorney for Western Greyhound Lines, that you, together with a few other individuals, have authorized and empowered Mr. Tanner to proceed to terminate dues deductions from your paycheck because you have failed and refused to sign a dues deduction authorization card. Subsequent thereto, Mr. Tanner again wrote Mr. Dezendorf stating that you demanded a refund of all dues deducted from your paycheck subsequent to August 11, 1959. We have received notice that Western Greyhound Lines, in conformance with the demand by Mr. Tanner on your behalf, has returned to you the sum of \$6.50, which covered your September dues, and, in return, Western Greyhound Lines demanded of Division 1055 the refund of this said \$6.50.

In conformance with the demand made upon Division 1055 by Western Greyhound Lines, we have refunded to the



company the sum of \$6.50 which covered your dues for the month of September, 1959.

Section 91 of the Constitution and General Laws of our International provides, in part, as follows: "Where agreements with employing companies provide that members must be in continuous good financial standing, a member in arrears one month may be suspended from membership and removed from employment, in compliance with the terms of the agreement."

Rule 3 of the agreement between Western Greyhound Lines and Division 1055 covering Western Greyhound Lines employees on Division 8 A requires that you maintain membership in good standing in Division 1055.

Upon the refund of the above mentioned dues, as requested by your attorney, Mr. K. C. Tanner, you are now delinquent in Division 1055 as of this date.

You are herewith notified that unless the said sum of \$6.50 as dues payment for the month of September, is received in the office of Division 1055 at 1111 S. W. Fifth Avenue, Portland, Oregon, on or before the close of business at 5:00 p.m. on October 28, 1959, we shall be required to notify Western Greyhound Lines to suspend you from employment in accordance with the foregoing quoted provisions of our International Constitution and the Contract between our Division and Western Greyhound Lines.

Fraternally,

C. A. Bankhead  
Financial Secretary

cc: John Elliott  
Bernard Cushman  
E. W. Oliver  
E. W. Cannon  
C. C. McCaffrey  
M. C. Frailey  
W. H. Egger  
Paul Bailey

**Plaintiff's Exhibit 3**

*Receipt No. 5701*

October 26, 1959

Received from Wilson P. Lockridge

Six Dollars and Fifty Cents (\$6.50)

For September Dues

Clarence A. Bankhead

---

**Plaintiff's Exhibit 4**

November 2, 1959

Mr. W. H. Egger, Regional Manager

[Western Greyhound Lines]

Eighth and Stewart Streets

Seattle, Washington

Dear Mr. Egger:

Mr. Elmer J. Day and W. P. Lockridge are not in good standing in our Union. They have suspended themselves from membership so in compliance with Section 3 of Contract B, I am asking that you remove them from employment.

Sincerely,

C. A. Bankhead

Financial Secretary

CAB/dh

cc: J. M. Elliott

M. C. Frailey

F. J. Day

W. P. Lockridge

**Plaintiff's Exhibit 5**

November 13, 1959

Mrs. W. P. Lockridge

Kuna

Idaho

Dear Mrs. Lockridge:

The task of answering your letter and returning the enclosed check is not one that gives me any pleasure. However, it is both my responsibility and duty to perform the duties imposed upon me by the Constitution and General Laws of the Amalgamated Association of Street, Electric Railway, and Motor Coach Employes of America as well as the contractual provisions entered into between Division 1065 and Western Greyhound Lines.

Mr. Lockridge's dues were paid to this organization; but for reasons known to Mr. Lockridge, he entered into an authorization, with others, for Attorney F. C. Tanner to demand his dues returned to him from the Company.

Following this the Company then entered a demand for the Union to refund the money previously sent to the Union for these members.

A letter by certified mail was then directed to each of the members involved, five in number, pointing out the member's responsibility to remain in good standing and penalty for failure to so maintain.

Subsequently, Mr. Oathes appeared at the Union office and paid three months for himself (August, September, and October) and one month for Mr. Lockridge, which would pay for September dues only. I specifically asked, "What does Lockridge intend to be about October dues?" which were also past due. Without attempting to quote Mr. Oathes in essence he said, "Let Lockridge take care of that, just give me a receipt for this." When I heard nothing further from Mr. Lockridge, the Company was notified

that he was no longer a member in good standing. In accordance with the contractual provisions of the contract, the Company notified the Union it was complying with the provisions of Section 3 of the contract. (All present employees covered by this contract shall become members of the Association no later than thirty days following its effective date and *shall remain members as a condition precedent to continued employment.*)

Mr. Lockridge by his willful refusal to pay the dues failed to maintain membership. This is a circumstance over which I have no control and is the sole responsibility of Mr. Lockridge.

I am indeed sorry that action on the part of a few disgruntled members over a check-off that has been in the contract for many, many years had to occur. It has been not only a headache to me but also a considerable waste of the membership's money in time and expense.

Very truly yours,

C. A. Bankhead  
Financial Secretary

**Plaintiff's Exhibit 8**

Seattle 1, Washington  
January 7, 1960

Mr. Wilson P. Lockridge  
Route 2  
Kuna, Idaho

On November 12, 1959, at approximately 6:15 p.m., you were advised by the Dispatcher at Boise, Idaho that you were suspended from services at the request of Amalgamated Association, Local 1055, for failure to remain in good standing as a condition of employment as provided for under Contract B, Section 3.

You are now advised that this suspension will remain in force until such time as you place yourself in good standing with Amalgamated Local 1055; however, if you do not return to our employment within a period of 90 days from the date of suspension, we will then consider you as terminated from employment with Western Greyhound Lines.

/s/ W. H. Egger  
Regional Manager

cc: Mr. M. C. Frailey  
ATTN: Mr. J. D. Maatte

Local 1055

CERTIFIED MAIL  
No. 344769

**Plaintiff's Exhibit 9****WESTERN GREYHOUND LINES**

Greyhound Building  
Market & Fremont Sts.  
San Francisco 5, California

February 2, 1960

Mr. W. P. Lockridge  
Route 2  
Kuna, Idaho

Dear Sir:

On January 7, 1960, Mr. Egger addressed a letter to you in connection with your employment status with Western Greyhound Lines. A copy of Mr. Egger's letter has just been brought to my attention, and I wish to inform you that Mr. Egger was in error in outlining this matter. On November 3, 1959, your services were terminated in accordance with our agreement with the Amalgamated Association.

Very truly yours,

/s/ M. C. FRAILEY  
Executive Vice President

cc-Amalgamated Association  
Division 1055

Mr. John Elliott, Int'l President  
Amalgamated Association  
Washington, D. C.

• • • • •

**Plaintiff's Exhibit 34****International Union Constitution:**

• • • • •

"Sec. 82. Each member will be entitled to all benefits, rights and privileges of this Association by strictly adhering to his obligation and by him and his L. D. obeying the Constitution and Laws. He must have been obligated into membership, properly enrolled in the General Office and be in possession of a certificate of membership.

Sec. 83. No member shall be allowed to injure the interests of a fellow member, by undermining him in place, wages, or in any other wilful act by which the reputation or employment of any member may be injured.

Sec. 84. The International Association and the L. D. in which a member hold membership shall be his exclusive representative for the purpose of collective bargaining as to wages, hours, working conditions, pensions, union security and check-off, and other conditions of employment, and for the negotiation and execution of contracts with employers pertaining to such matters. Both the International Association and the L. D. in which a member holds membership are by him irrevocably authorized to act for him before any committee, board of arbitration, or arbitrator, court or other tribunal in any matter affecting his status as employe and to represent and bind him in the presentation, prosecution, adjustment and settlement of all grievances, complaints, or disputes arising out of his employment relationship."

• • • • •



## Plaintiff's Exhibit 35

• • • • •  
Sections 3(a) and (b) of the collective bargaining agreement:

"3. MEMBERSHIP IN AND RECOGNITION OF THE ASSOCIATION, GRIEVANCES AND ARBITRATION: (a) All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and shall remain members as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY.

(b) The Company recognizes the Association as the duly designated representative for all employees included in the scope of this Agreement."

• • • • •  
4(b) The Company agrees to notify the employee in writing of the placing of anything for or against him or her on his or her record. An employee will not be disciplined or dismissed from service nor will entries be made against his record without sufficient cause, and he shall be furnished with a full, complete and clear written statement of the charges against him and copy will be furnished the Association. No discipline by suspension shall be administered any employee which shall permanently impair seniority rights."

## Idaho Supreme Court Decision

[Filed October 15, 1969]

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9959

Boise, November Term, 1968

• • • • •

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. The Honorable Merlin S. Young, District Judge.

Action by a former member of a labor union against the union for reinstatement to membership and for damages resulting from an improper discharge from membership. Judgment *affirmed, as modified, and remanded.*

McClenahan & Greenfield, Boise, Earle W. Putnam, Cole and Groner, Washington, D. C., Bailey, Swink, Haas, Seagraves and Lansing, Portland, Oregon, for appellant.

Anderson, Kauffman, Anderson & Ringert, Boise, for respondent.

SPEAR, J.

This is the second appearance of this cause before this court. See *Lockridge v. Amalgamated Ass'n of St. El. Ry. & M.C. Emp.*, 84 Idaho 201, 369 P. 2d 1006 (1962). The issue presented is the same: "Does the National Labor Relations Act pre-empt state court jurisdiction over the question of whether a union member has been improperly expelled from membership in the union for alleged non-payment of dues in violation of the contractual relationship between the two?" Appellant union urges that seven decisions subsequent to the previous *Lockridge* decision require reversal of that decision. Appellant points particularly to *Plumbers' Union v. Borden*, 373 U.S. 690, 10 L.Ed. 2d 638, 83 S.Ct. 1423 (1963); *Iron Workers v. Perko*,

373 U.S. 701, 10 L.Ed. 2d 646, 83 S.Ct. 1429 (1963); *Cox's Food Center, Inc. v. Retail Clerks U. Loc. No. 1653*, 91 Idaho 274, 420 P.2d 645 (1966); and *Day v. Northwest Division 1055, et al*, 238 Ore. 624, 389 P.2d 42 (1964). It is the opinion of this court that the issues in this case are identical to those presented in *International Assn. of Machinists v. Gonzales*, 356 U.S. 617, 2 L.Ed. 2d 1018, 78 S.Ct. 923 (1958), and as such require an affirmance of the decision below. However, since the decisions in *Borden* and *Perko* have to some extent impaired the vitality of *Gonzales*, we feel that further elaboration of the facts and law relied upon must be made and the scope of *Lockridge* limited as set forth herein.

Wilson P. Lockridge was born October 15, 1915. He had a limited education, completing his formal education at the conclusion of the 8th grade. Between the ages of approximately fourteen and twenty-two, he was employed on his father's farm. Thereafter, from 1937 until May 1943 he drove truck for a creamery. In May of 1943 respondent Lockridge went to work for Union Pacific Stages, driving a bus. At that time he also became a member of the appellant union. In 1945 Lockridge began working for Greyhound Corporation or a subsidiary thereof which acquired Union Pacific Stages. Thereafter Lockridge was continually a member of the union and employed by Greyhound until November 2, 1959. On November 11 or 12, 1959, after returning from a hunting trip, Lockridge was informed that his membership in the union had been terminated and a request had been made by the union to representatives of Greyhound that his employment be terminated. The contents of this letter, dated November 2, 1959, is set forth as follows:

"Mr. W. H. Egger, Regional Manager  
Eighth and Stewart Streets  
Seattle, Washington

Dear Mr. Egger:

Mr. Elmer J. Day and Mr. W. P. Lockridge are not in good standing in our Union. They have suspended themselves from membership so in compliance with Section 3 of Contract B, I am asking that you remove them from employment.

Sincerely,

/s/ C. A. BANKHEAD  
C. A. Bankhead  
*Financial Secretary*"

At that time a contract existed between appellant and Greyhound which contained the following pertinent provision referred to in the Bankhead letter:

"3. Membership in and Recognition of the Association, Grievances and Arbitration: (a) All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and shall remain members as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY."

The pertinent part of the Union's Constitution and General Laws, provided as follows:

**"DUES, SUSPENSIONS AND REINSTATEMENTS**

"Sec. 91. All dues, \* \* \* of the members of this Association are due and payable on the first day of each month for that month, \* \* \* They must be paid by the fifteenth of the month in order to continue the member in good standing. \* \* \* A member in arrears

for his dues, \* \* \* after the fifteenth day of the month is not in good standing \* \* \* and where a member allows his arrearage in dues, fines and assessments to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage for dues, fines and assessments to run *over the last day of the second month* without payment, he does thereby suspend himself from membership in this Association, \* \* \* Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement." (emphasis added)

It is obvious from a reading of the materials quoted above, that Lockridge was *not* subject to suspension or dismissal from the union for non-payment of October dues on November 2, 1959. It is equally obvious that Mr. Bankhead confused Section 3 of Contract B, the only one applicable to Lockridge with Section 3 of the Contract C, which provided for suspension of members *not in good standing*.<sup>1</sup>

At this point it is interesting to note the results of the divergent remedies which were sought by the two suspended

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<sup>1</sup> "3. Membership and Recognition of the Association, Grievances and Arbitration:

(a) Any employee who now is a member in good standing or who, after May 15, 1946 (after May 1, 1951, for General Acet. Dept. employees), becomes or is reinstated as a member of the Association, shall, as a condition of continued employment, maintain such membership in good standing. Any employee first hired after May 15, 1946 (after May 1, 1951, for General Acet. Dept. employees), shall, as a condition of continued employment, become on or before thirty days from the date of hiring a member of the Association and thereafter maintain such membership in good standing."

members. Day immediately filed an unfair labor practice charge with the N.L.R.B. Seattle Regional Office. Lockridge began petitioning the union for redress of his grievances. Day's petition was rejected by the regional director of the N.L.R.B.<sup>2</sup>

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<sup>2</sup> "Mr. Elmer J. Day  
Route 3, Box 90  
Sherwood, Oregon

Re: Western Greyhound Lines  
36-CA-986  
Street, Elec. Railway, and Motor  
Coach Employees, Div. 1055  
36-CB-238

Dear Mr. Day:

The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigation, it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D.C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D.C. by the close of business on December 28, 1959. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours,

THOMAS P. GRAHAM, JR.  
Regional Director"

Lockridge's appeal was rejected by the union.<sup>3</sup>

The basis for the Regional Director's decision is not too clear, but it is obvious that the union had terminated Lockridge's membership. On the other hand, Greyhound, by

<sup>3</sup> "Dear Mr. Lockridge:

This will acknowledge receipt of your letter of January 18, 1960, requesting that I, or the General Executive Board, waive the provisions of Section 94 of the Constitution and General Laws of this organization in order that you might be reinstated to membership. Please be advised that, in my capacity as International President, I have no power to waive the provisions of the Constitution and General Laws.

Perhaps you have in mind Section 170A of the Constitution and General Laws which now provides as follows:

'The I.P., I.S.T., Vice-Presidents and G.E.B. shall constitute a committee and shall have power, unless prohibited by the Labor-Management Reporting and Disclosure Act of 1959, to waive any clause of this Constitution by a three-fourths vote of this Committee, such action being binding upon the A.A. of S.E.R. and M.C.E. of A. only until the convening of the next Convention of the Association.'

The General Executive Board has ruled that Section 170A is intended to be used only in emergency situations and then only at the instance of the officers of the International Union or the General Executive Board when such situations threaten to impair the administration of the affairs of the Association or its Local Divisions. The Board has ruled that Section 170A was not intended to be available to an individual member or former member or to be a substitute for the appeal procedures of our Constitution and General Laws. Accordingly, the General Executive Board declined to process your request for waiver.

I wish to add, however, that even if I had the power to waive Section 94, I would not, on the basis of the information before me, be inclined to support your request. As I understand the facts, you were validly discharged for non-payment of dues on November 3, 1959, pursuant to the provisions of Section 3 of Contract B between Western Greyhound Lines and the Council of Western Greyhound Amalgamated Divisions and the various Amalgamated Divisions, including Division 1055. Your discharge had been requested by Division 1055, pursuant to the contract, for non-payment of dues within the time required under the Constitu-



letter of February 2, 1960, obviously felt obligated to withhold employment from Lockridge until his membership status in the union was restored. Thus Lockridge (and Day for that matter) could not be employed by Greyhound until restored to membership. At this point it must have been clear to both men that they would not obtain relief from either the union, the employer or the N.L.R.B. Therefore, they each turned to their respective state courts. After the jury had returned a verdict in Day's favor, the union appealed to the Oregon Supreme Court, which reversed the judgment in *Day v. Northwest Division 1055, et al*, 389 P.2d 42 (Ore. 1964), stating that the subject-matter had been pre-empted and that *Borden* and *Perko* were controlling. The United States Supreme Court denied review.

Appellant's position may be summarized by three contentions: (1) Congress has pre-empted all state court jurisdiction over union-member relationships since it has comprehensively regulated the field. (2) There was no unfair labor practice because Lockridge's dismissal from the union and consequently from employment was in accord with union rules and the contract and therefore was protected by the proviso to sec. 8(b)(1)(A) and sec. 8

tion and General Laws. You have offered no reasons and furnished no evidence as to why the Constitution and General Laws should be waived. Indeed, my investigation discloses that you were put on notice by the Division's letter of October 22, 1959 of the importance of paying your dues within the period required under the Constitution and General Laws. Nevertheless you thereafter failed to pay your dues as required by our laws.

I might add that in my opinion, the privilege of reinstatement under Section 94 is not available to a member discharged under Section 91 under a union security contractual provision. It is, however, unnecessary to rule on this point here.

Very truly yours,

/s/ JOHN M. ELLIOTT

John M. Elliott

International President"

(b)(2) of the National Labor Relations Act<sup>4</sup> and at the very least there would be no cause of action. (3) If this was not a proper dismissal in accordance with union rules and the contract, then the dismissal was in violation of 8(b)(1)(A) generally and 8(b)(2) in particular and therefore an unfair labor practice. In other words, a union cannot, first of all and in general, impair the right of an employee to either join or refrain from joining a union, in violation of 8(b)(1)(A) and, second of all, in particular, a union cannot cause the employer to discriminate against an employee by having the former terminate the latter's employment for some reason other than non-payment of regular dues, in violation of 8(b)(2). The union then argues that since the trial court found Lockridge *had* paid his dues on time the union necessarily committed an unfair labor practice. Therefore, since *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959) held that conduct which was arguably an unfair labor practice was pre-empted, the union's conduct in this case being certainly an unfair labor practice must be per-empted. We shall deal with each of these contentions in order.

(1) There is total pre-emption of the field.

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“ (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;” (29 U.S.C. § 158 (b) (1); 29 U.S.C. 158 (b) (2)).

This proposition is not true. Appellant's argument on this point sweeps with too wide a broom. We find under part (3) hereinafter that this court has jurisdiction over the particular subject matter of this particular suit, and it necessarily follows that the broad proposition of total pre-emption, which appellant argues here, is not valid.

- (2) This was a proper dismissal and therefore protected activity.

This argument, too, can be summarily dismissed because appellant has conceded on this appeal that it did not dismiss respondent in accordance with either union rules or the contract with Greyhound. Furthermore, appellant did not seriously contend otherwise in the court below since its arguments were almost exclusively directed toward the court's jurisdiction with respect to service of process and subject-matter jurisdiction. Finally, it is readily apparent, on the basis of those portions of the labor contract and the union constitution hereinbefore cited, that this is a position which is untenable. The trial court so found <sup>5</sup> and no appeal was taken therefrom.

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<sup>5</sup> (Finding of Fact VII). "That the contract agreement (Exhibit 35), \* \* \* requires that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to continued employment. Section 91 of the Constitution of the International Association (Exhibit 34) provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and further, *where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership* in the association, meaning the International Association. \* \* \* That at the time of their suspension from membership in the International Association on or about November 2, 1959, plaintiff and said Day were in arrears in payment of their dues only since the 1st day of October, 1959. \* \* \* "

- (3) This was an unfair labor practice and therefore pre-empted.

This brings us, then, to appellant's most serious argument. At the outset, we concede much of what appellant argues. Appellant, in the opinion of this court, did most certainly violate 8(b)(1)(A), did most certainly violate 8(b)(2) (i.e., see *Krambo Food Stores, Inc.*, 114 N.L.R.B. 241 (1955)) and probably caused the employer to violate 8(a)(3),<sup>6</sup> all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the National Labor Relations Board and are *not* subject to adjustment by, or interference with, Idaho courts. However, in addition to at least three unfair labor practices appellant did commit a breach of the contract between itself and W. P. Lockridge, a member. That contract provided that Lockridge would have continued membership in his union so long as he paid his dues no later than the end of the

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<sup>6</sup>"Sec. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section [9 (a)] \* \* \*; *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;" (29 U.S.C. § 158(a) (3)).

second month after they became due. None of the cases cited by appellant stands for as broad a proposition as that for which appellant contends. Preemption is not established simply by showing that the same facts will sustain two different legal wrongs. This would be analogous to precluding a contract action by proving the facts also establish a tort. The conflict to be avoided is two different bodies, analyzing the same facts, reaching the same or different interpretations of those facts and apply [*sic*] conflicting remedies. In this case, as will be pointed out later, the conflict between this court and the N.L.R.B., if extant, is not significant and the result we reach is consistent with the underlying policy of the national labor legislation.

Of course, it is not enough to simply state that this is an internal union matter. The "internal union matter" must be of a particular nature. The suit must be limited so that it focuses "on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought [must be] restoration of union membership rights." *Plumbers Union v. Borden*, 373 U.S. 690 at page 697; *International Assn. of Machinists v. Gonzales*, 356 U.S. 617. From the outset respondent attempted to regain his membership. This is the import of all his correspondence with the union. The only record of contact with the employer are the two letters from Greyhound informing him of his termination. The only relationship his employment has to this case is a means by which damages can be computed. The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief. His prayer for equitable relief was framed in general terms and this court concludes that in this case or any other within the narrow area where we can assert jurisdiction to relieve

wrongfully denied membership, the primary relief which can and shall be granted is restoration of union membership. Damages, if any, are a secondary consideration, and shall be limited to compensation for damage suffered until such time as membership is restored.

Restoration of union membership is not a remedy which the N.L.R.B. can afford. *International Assn. Machinists v. Gonzales*, supra. Under the law of Idaho, membership in a labor union constitutes a contract between the member and the union. *Lockridge v. Amalgamated Ass'n of St. El. Ry. & M.C. Emp.*, 84 Idaho 201, 370 P.2d 789 (1962). Our decision in this case is designed solely to give "legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein'". *International Assn. Machinists v. Gonzales*, 356 U.S. at page 620. The purpose for which we exercise jurisdiction is to avoid leaving "an unjustly ousted member without remedy for the restoration of his important union rights." "Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act." *Gonzales*, 346 U.S. at page 620.

As previously pointed out, there may have been violations of the Act, but the Board in such a case would focus on the union-employment relationship and order restoration of employment. The Board's power to make such an order and determination precludes any such determination by this court or any interference by the court with the employee-employer relationship. However, the Board cannot restore membership in the union; this court can. *Gonzales*, supra. Also, the National Labor Relations Board could not give respondent the relief that Idaho law can give him according to our local law of contracts and damages. Additionally, the possibility of partial relief from the Board does not, in such a case as is here presented,

deprive a party of available state remedies for all damages suffered.

"If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference



to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A.B.A.J. 415, 483." (*International Assn. Machinists v. Gonzales*, 356 U.S. pages 621 through 623.)

This, then was the state of the law and its application to this case at the time of the *Gonzales* decision. However, appellant insists that this decision is altered by subsequent cases.

The landmark case, cited as the genesis of the trend limiting *Gonzales*, is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S. Ct. 773 (1959). *Garmon* was written by Justice Frankfurter, author of the *Gonzales* decision. The case itself arose out of a recognition dispute between two unions and an employer. It involved conduct which represented one of the vital tools of organized labor and a protected right for all employees—picketing. The parties disputed over whether the picketing was unprotected coercion or protected publicity. The N.L.R.B. declined jurisdiction. California courts asserted jurisdiction because the Board had declined to do so and then the state courts enjoined the picketing. Justice Frankfurter, in reversing the state court decision, began by quoting from *Weber v. Anhaeuser Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955):

"By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the



operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union*, *supra* [346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228]. But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much." 346 U.S. at page 488, 74 S.Ct. at page 164. This penumbral area can be rendered progressively clear only by the course of litigation.' " 359 U.S. at page 240.

Justice Frankfurter then expanded on these basic considerations:

"We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018. Or where the regulated conduct touched interests so deeply

rooted in local feeling and responsibility that, in the absence of compelling congressional direction we could not infer that Congress had deprived the States of the power to act." 359 U.S. at pages 243-44.

The central rule of the case was then reached, in the following language:

"When it is clear or may fairly be assumed that the activities which a State purported to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U.S. at page 244.

In applying this rule to the facts it was pointed out that the particular conduct sought to be regulated was assumed to be, and was treated as, an unfair labor practice.

"The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act." 359 U.S. at page 245.

The court concluded that it did not matter whether this was protected or prohibited activity, or even whether the Board asserted jurisdiction. The issue, then was, was this a *class or type* of conduct which was *arguably* subject to the Board's cognizance, which by their administration and promotion of the policies of the act could best be handled? Was there "uncertainty" as to whether an act or practice would be protected or not?

The distinction between the type of conduct in *Garmon* and the type of conduct here is clear. The former involved the most fundamental aspects of concerted action, the very heart of the national labor policy, over which the regulatory power of the Board has never been questioned. Here the conduct centers on membership rights in the union, critical from an individual member's viewpoint, but conduct, excluded from the operation of the act. The remedy sought here does not impair the assertion of collective rights but rather, guarantees the availability of those collective rights to individual members. As can be no more clearly presented than by the facts in this case themselves, if this court did not assert jurisdiction, respondent would never regain his union membership.

Appellant, however, insists that the "arguably subject" test is the one which now applies to this class of cases, citing *Plumbers' Union v. Borden*, 373 U.S. 690, 10 L.Ed.2d 638, 83 S.Ct. 1423 (1963), and *Iron Workers v. Perko*, 373 U.S. 701, 10 L.Ed.2d 646, 83 S.Ct. 1429 (1963). However, Justice Harlan, in those cases specifically distinguished the situations presented there from *Gonzales* and he pointed to many important policy questions involved in those cases which were more properly to be decided by the Board.

Borden and Perko never sought reinstatement in the union. *They had never been denied their membership.* In both cases the individuals complained that they had been denied the benefits of a *particular* job. Borden wanted to work for a particular employer and was, for apparent disciplinary reasons, refused a necessary referral by the union. Perko complained that he was not able to work as a foreman or superintendent. The court said of Perko:

"As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations *and was not directed*

to internal union matters." 373 U.S. at page 705 emphasis added)

Furthermore, *Borden* involved "difficult and complex problems inherent in the operation of union hiring halls" while *Perko* presented "difficult problems of definition of status and coercion \* \* \* of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole."

The result we reach is contrary to that reached in *Day v. Northwest Division 1055, et al*, 389 P.2d 42 (1964). However, in *Day* there is a specific finding of discrimination on the part of the union. In light of such a finding an unfair labor practice would be established. There was no such finding in this case and the conclusion of the court below is one amply supported by the evidence and one in which we concur. This was a misinterpretation of a contract. Whatever the underlying motive for expulsion might have been, this case has been submitted and tried on the interpretation of the contract, not on a theory of discrimination. The fact that the Board might go deeper into the union motivation and discover an unfair labor practice simply serves to point up the distinction between the facts we focus upon and those which the Board would focus upon. That the Board might find an unfair labor practice in both an underlying "discriminatory" motivation and an honest misunderstanding of the contract, is simply a determination which is necessary to establish the Board's jurisdiction and its power to enforce the remedies within its cognizance.

However, aside from this distinguishing point in *Day*, we also believe that the majority there took too shallow a view of the case law and pertinent legislation. Rather, we believe the opinion of Justice Perry, dissenting, to be the better reasoned.

After the trial on the merits, the trial court made certain findings of fact to which appellant has made no as-

signments of error on appeal and therefore such findings are necessarily binding on this court. Among such findings are the following:

"That on November 2, 1959, plaintiff [respondent herein] had over 16 years seniority as a bus driver under the laws of the union and the employment contract, and such seniority commensurate rights and benefits and working privileges and compensation to be received therefrom.

"That on or about November 2, 1959, C. A. Bankhead, treasurer and financial secretary of Division 1055, acting in his official capacity and within the scope of his activities as a treasurer and financial secretary and, under the facts and reasonable inferences to be drawn therefrom, acting for the International Association and pursuant to the knowledge and approval of it, if not direct advice or ordered from, the International Association president, and International vice-president, and a member of the general executive board of the International Association, suspended plaintiff from membership in the union *on the sole grounds that plaintiff was in arrears in payment of dues, contrary to the requirements of the constitution and general laws of the union*, and by letter dated November 2, 1959 notified the employer Western Greyhound Lines that plaintiff was no longer a member in good standing in the union and requested said employer to remove him from employment. That immediately following receipt of such notice from C. A. Bankhead, the employer discharged plaintiff from employment. One Elmer Day was likewise suspended under identical circumstances. (emphasis added)

"That at the time plaintiff's wife was notified of plaintiff's suspension from union membership in early November, 1959 (plaintiff was elk hunting during a vacation period) plaintiff's wife, by letter dated November 10, 1959,

submitted to C. A. Bankhead, financial secretary of the Division 1055 a check to cover plaintiff's dues for both October and November but said C. A. Bankhead refused to accept the same and the check was returned (Exhibit 5).

"Following his return to Boise in mid November, 1959, and immediately upon learning of his suspension from union membership with resulting termination of his employment, plaintiff contacted C. A. Bankhead requesting advice as to what he could do to obtain reinstatement of his union membership *and on several occasions submitted checks for his arrearages and penalties all of which were refused.* (emphasis added) • • •"

The trial court additionally found that section 93 of the union constitution provided:

"that where members are in arrears past the last day of the second month they shall, at the last meeting of each month, be reported by the financial secretary as having suspended themselves from membership except where members are suspended in compliance with the terms of agreements, the members *may* be so reported and suspended after the period of one month. That at the time of their suspension from membership in the International Association on or about November 2, 1959 plaintiff and said Day were in arrears in payment of their dues only since the first day of October 1959."

As previously mentioned in this opinion, no appeal has been perfected from any of the findings of fact. Additionally, on the basis of what respondent's replacement, a man named Carter, actually earned in the years 1959 through September 15, 1965, in the same employment which respondent had prior to his unlawful suspension by the union, the court found that during that period respondent

had suffered a loss in earnings of approximately \$32,678.56, i.e., the difference between what he would have earned at his regular employment as a bus driver and what he did earn as an employee of the Highway Department of the State of Idaho, and on that basis the trial court awarded respondent damages for loss of wages in the sum of \$32,678.56. In the judgment the trial court further decreed that the respondent be restored to membership in the union upon tendering payment of his current dues.

As it was first rendered and filed, the judgment also provided that respondent should be restored to his seniority rights. However, upon motion to amend the findings of fact, conclusions of law and judgment, the trial court, after hearing thereon, struck from the decree and from the findings and the conclusion such restoration of seniority rights and also a provision allowing the respondent the sum of \$3,500 per year in damages from the union from and after September 15, 1965 until he had been restored to membership and full seniority rights. This is the state of the judgment from which the appeal was taken on the three contentions by appellant, disposition of which has already been made.

Respondent by way of cross-appeal raised several issues, the most important of which is that of restoration of seniority rights. In order to grant respondent the full equity to which he is entitled, in addition to the money damages awarded him by the trial court, he must necessarily be restored by the appellant union to full seniority rights. The trial court, therefore, was in error, in striking from the findings of fact and conclusions of law and the judgment the restoration of such rights, upon motion of appellant. Upon remanding of this cause the trial court is hereby ordered to restore these rights of seniority to respondent.

Respondent additionally contends that the trial court erred in not awarding damages in the amount of overtime



compensation which Lockridge could have worked. The trial court was the finder of facts and since the court was not convinced that Lockridge could or would have worked the overtime in question, this portion of the judgment is affirmed.

Finally, respondent prayed for damages of \$50,000.00 for discomfort, embarrassment, humiliation and mental anguish and the trial court specifically found that such elements did exist from the facts adduced at the trial but omitted to award any sum for such damages. Respondent assigns this as error. Such damages must necessarily be based upon mental suffering and the attempt to recover them from a breach of contract has generally been met with disfavor by the courts. Denial of damages is based upon several grounds, e.g., remoteness of the injury from the breaching act; lack of an adequate standard or measure of such damages; the danger of speculative and easily simulated injuries which would be difficult to disprove; and the inevitable fear of increased litigation. There is a growing tendency to consider mental damages as a proper element in these actions just as in actions sounding in tort; but this is definitely a minority viewpoint, and we choose to adhere to the majority holdings which deny such recovery. See 32 Notre Dame Lawyer 482. Thus the trial court committed no error in not awarding such damages to respondent.

In thus disposing of the various contentions of the parties we reach a decision which, rather than conflicting with federal labor policy, seeks to strengthen an underlying philosophy of that policy, i.e., one is entitled to gainful employment and the fruits of collective bargaining; and this is so, regardless of the employee's attitude toward the union or his failure to cooperate with a certain union policy—such as the automatic checkoff—with which he personally disagrees. The policy considerations behind this decision do not militate against the discipline which



is necessary to preserve the goals of concerted action, but rather militate in favor of the basic purpose for which national labor law was created: they provide the working-man with a fair share of the fruits of his labor.

Judgment affirmed, as modified, and remanded for restoration of respondent's seniority rights in the union, such judgment further reserving to respondent the right to petition the district court for final determination of damages for loss of earnings accruing since September 15, 1965. Costs to be shared by the parties as agreed in the instrument dated October 17, 1966.

McFADDEN and DONALDSON, JJ., and SCOGGIN, D.J., concur.

McQUADE, J., dissenting.

The majority today reaches a position which is, perhaps, tenable as a matter of pure logic.<sup>1</sup> I cannot, however, agree with them that it is the law. They attempt to fit this case within the too-narrow "internal union matter" exception to the doctrine of federal pre-emption in labor law. That niche is entirely too small to accommodate this particular action. Although this ground has been plowed here before,<sup>2</sup> a recapitulation of the United States Su-

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<sup>1</sup> See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv.L.Rev. 641 (1961). Professor Michelman, in that thoughtful if not wholly realistic article, observed: "The more state courts are hemmed in by sweeping pre-emption rules which prevent them from reaching a sensible decision on the facts of a particular case, the more they are likely to struggle to evade or to avoid the rules. The disposition of difficult cases may not be greatly facilitated, and there will be some compulsion to a kind of lawlessness in the federal system which cannot be effectively policed." *Id.*, at 683. That observation applies acutely to this case.

<sup>2</sup> *Cox's Food Center, Inc. v. Retail Clerks Union, Local No. 1653*, 91 Idaho 274, 420 P.2d 645 (1966).

preme Court cases, and the principles which may be derived therefrom, may serve to indicate more precisely the errors upon which the majority opinion is founded.

For over a decade prior to 1959, the Supreme Court sought delicately to adjust the relationship of state and federal powers in the area of labor adjudication in order optimally to serve the competing purposes of the national labor legislation and the values of our federal system. Although that process contributed greatly to the confusion with which we are involved in this case, a recapitulation of a few of the leading cases of that period will serve to explicate the full scope of the pre-emption doctrine announced in *San Diego Building Trades Council v. Garmon*.<sup>3</sup>

The first of the important cases was *Garner v. Teamsters Union*,<sup>4</sup> which involved an attempt to induce the State of Pennsylvania to enjoin picketing which was fairly clearly a matter for the N.L.R.B. In the course of an opinion holding the dispute not to be a proper object of state jurisdiction, a number of elements, thought to be important in pre-emption cases were discussed. That case was distinguished from those involving injurious conduct which the National Labor Relations Board had no express power to prevent and which was, therefore, either "governable by state law or it is entirely ungoverned." And the case was found to be one not involving mass picketing or threats to the public peace and safety and, therefore, a "local matter."

In *Garner* there were three principles upon which the affirmative holding of pre-emption was founded. The first was the oft-repeated theory that the very core of the pre-emption doctrine was a conflict of remedies. Justice Jackson seemed to mean that if a state court would pro-

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<sup>3</sup> 359 U.S. 236 (1959).

<sup>4</sup> 346 U.S. 485 (1953). The labor law pre-emption theory dates at least back to *Hill v. Florida*, 325 U.S. 538 (1945).

vide a sanction for conduct which was subject to N.L.R.B. cognizance when the federal tribunal would not allow such a sanction, then there was a "conflict between state and federal remedies." This actually seems to mean that the conflict to be avoided is between differing substantive standards of primary and not remedial law, but Justice Jackson phrased it in terms of remedies and that phrasing was very important until *Garmon*, six years later. The second principal leg for *Garner* was that the federal labor law plan not only comprehended a set of new rules, but also a new tribunal, with its own procedure and system of remedies; this was a comprehensive system of regulation, interference with any part of which was likely to damage the entire fabric. "A multiplicity of tribunals and a diversity of procedures are quite as likely to produce incompatible or conflicting adjudications as are different rules of substantive law." And the final leg for the *Garner* decision was a corollary to the other two. It was that, when a matter was subject to the invocation of the federal labor law, the congressionally devised Labor Board had primary jurisdiction to interpret the substantive law expertly and uniformly.

The next key case was *United Construction Workers v. Laburnum Constr. Co.*<sup>5</sup> This case involved a series of riotous attempts by a subsidiary union of the United Mine Workers to organize some A.F.L. employees of a building contractor who happened to have a job in coal-mining country. The state court tort judgment was upheld by the United States Supreme Court as not preempted. In so holding that Court assumed that the conduct involved constituted an *unfair* labor practice. The *Garner* case was distinguished therein, because in that case Congress had provided a preventive remedy exactly parallel to that which the state court was asked to impose. *Laburnum*, it was said, involved no such conflict of remedies because "Con-

<sup>5</sup> 347 U.S. 656 (1954).

gress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." Pre-emption was, thus said to turn on whether or not the N.L.R.B. could give the same relief which the state sought to provide. Justice Douglas filed a dissent in *Laburnum*.<sup>6</sup> It was his position that the federal law was a comprehensive system of rules, procedures and remedies which was designed to avoid disruptions of commerce by bringing labor disputes to orderly and rapid conclusions. The provision of an alternative, lucrative state court remedy would upset this delicate balance and cause controversies to live long in the courts, depriving the federal scheme of its healing effects and keeping old wounds open.

Following *Laburnum*, the next case which attempted further to elucidate the theoretical underpinning of pre-emption was *Weber v. Anheuser-Busch, Inc.*<sup>7</sup> In that opinion, holding that a state anti-trust law injunction would not lie, Mr. Justice Frankfurter reiterated the *Garner* theory of primary jurisdiction to decide what was prohibited and what protected and the notion that the crux of the pre-emption matter was the conflict of remedies. *Garner* was, thus, said to turn on the fact that there were "two similar remedies, one state and one federal, brought to bear on precisely the same conduct." And it was on this ground that the *Laburnum* case was distinguished, "the violent conduct was reached by a remedy having no parallel in and not in conflict with, any remedy afforded by the federal Act." While much of this still sounded as if a conflict of primary rules was the difficulty, the reference to *Laburnum* only served to emphasize that it was competition among remedies which was considered crucial. *Weber* finally declared that it did not matter that the state power was invoked to serve some

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<sup>6</sup> 347 U.S. 656 at 671.

<sup>7</sup> 348 U.S. 468 (1955).

regulatory purpose other than the ordering of labor relations. The pre-emption doctrine protected the N.L.R.B.'s primary jurisdiction to characterize and remedy conduct. Competition with that competence from state tribunals was not to be countenanced on any theory.

The final pre-*Garmon* cases which are important here are the *Gonzales*<sup>8</sup> and *Russell*<sup>9</sup> cases wherein the court was again able to hold no pre-emption. These two cases might be said to have represented the high-water mark of concurrent state jurisdiction in labor law. The *Russell* case involved a very ambiguous fact situation stemming from conduct which was either very nearly as egregious as that in *Laburnum* or else no more disorderly than might be expected in any tense, major strike. In upholding an award of exemplary and compensatory damages (as compensation for lost wages during the strike) the United States Supreme Court further muddled the waters. Where *Garner* had rejected a distinction between actions to vindicate public rights from those to compensate private rights and where *Weber* had rejected the notion that there was a relevant distinction between state general law and state labor law, the *Russell* case seemed to go in exactly the opposite direction. Although there was an N.L.R.B. remedy which exactly duplicated the compensatory damages for lost wages, the *Russell* opinion held that there was no conflict of remedies. This, it was reasoned, was because the principles which supported the state court action were private principles of general law, while those underlying the N.L.R.B. action were designed to vindicate public rights and "to effectuate the purposes of the Federal Act." Therefore, it was said, precisely the same sanction directed at precisely the same conduct (and justified by findings of a non-expert, non-federal tribunal) did not constitute

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<sup>8</sup> *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958).

<sup>9</sup> *Automobile Workers v. Russell*, 356 U.S. 634 (1958).

a conflict of remedies. After *Russell* it could reasonably be said that general state tort law sanctions could be freely directed at labor relations activity which, based upon state court findings of fact, was not protected by federal law.

*Gonzales*, upon which the majority relies so heavily, was decided on the same day as *Russell*. It was a California contracts case in which a union member, who claimed to have been wrongfully expelled from his union, was ordered reinstated and given damages for lost wages as well as for mental and physical suffering caused by the union's breach of contract. Justice Frankfurter, again writing for that Court, admitted that there might be an unfair labor practice made out by the facts, but preferred to characterize the action solely as one giving effect to a union member's rights without reference to extra-union employment or labor relations factors. This was so even though the damages given closely paralleled the award which the National Labor Relations Board could have imposed if it had found an unfair labor practice. The possibility of conflict with national labor policy was, for no articulated reasons, said to be "too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."<sup>10</sup> This conclusion, which in terms of legal and logical argument was mere *ipse dixit* was "emphasized" by an examination of [the] way in which the lower courts and the parties characterized the action. It was a contracts action and, therefore, it served "internal" purposes. If it had been a labor law case, presumably it would have been "external" and pre-empted. Justice Frankfurter's examination of the theory of the pleadings to establish the distinction between the state's focus on internal union matters and the national focus on external labor relation matters smacks somewhat of the aridity of the ancient forms of action.

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<sup>10</sup> 356 U.S. 617, at 621.

After 1958 it might readily be concluded that there was a wide area of activity, or cases, or remedies which were solely the province of the National Labor Relations Board. And, especially after *Gonzales* and *Russell*, it could be as well concluded that there was as wide an area which was subject to the concurrent jurisdiction of the state and national tribunals. There was not, however, any well-evolved set of clear principles which could be applied to determine into which category a given case might fall. As we pointed out the first time that Mr. Lockridge's litigation was before us the law in the area was confused and unsettled.<sup>11</sup> The various cases seemed each to announce a new rationale repugnant to the last. The difficulty, as the justices had never ceased to mention and as professor, and later solicitor general, Cox had early pointed out, was that Congress had never delineated the boundaries of the two jurisdictions.<sup>12</sup> The Supreme Court had attempted to fill this breach by statutory interpretation which was based on the assumption that there had to be some, but not much, concurrent state jurisdiction.<sup>13</sup> Professor Cox had rightly warned that this allowance of simultaneous jurisdiction over the same matter would ultimately lead to excessive litigation and confusion as every point of state law would ultimately have to be passed on by the United States Supreme Court.<sup>14</sup> That Court's effort to draw the jurisdictional boundaries according to sensitive, subtle judgments about the relative positions

<sup>11</sup> *Lockridge v. Amalgamated Ass'n of St. El. Ry. & M. C. Employees*, 84 Idaho 201, 208, 369 P.2d 1006 (1962).

<sup>12</sup> See Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L.Rev. 1297 (1954).

<sup>13</sup> Compare *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958), and *Garner v. Teamsters Union*, 346 U.S. 485 (1953), with *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957).

<sup>14</sup> Cox, *supra* note 12, at 1315-1317.



of the competing state and national interests through a process of "litigating elucidation" on a case by case basis had, as we have seen, come a cropper. The justices had simply been unable to state coherently what the controlling considerations were. Some of the supposed "principles," especially the notion of conflict of remedies, seemed to be tenuously related to considerations of national labor policy at best. It was this background against which the strict, even "wooden" rule of the *Garmon* case stands so starkly. A careful reading of *Garmon* indicates that in it, the majority of the Supreme Court, led again by Justice Frankfurter, embarked on a new course departing substantially from the line of decisions which preceded it.

The majority opinion in *San Diego Building Trades Council v. Garmon*<sup>15</sup> began by describing the difficult process of attempting to give meaning to a statutory framework which was vague, poorly foreseen or utterly unperceived as a process of "giving application to congressional incompleteness." This complaint of congressional inactivity was followed by a plea that, if a better and more sensitive demarcation than that provided by the courts was wished, it was up to the Congress to draw better and more precise boundaries by enactment. This suggested action, echoing Professor Cox's argument made five years before, if it had been acted upon by the National Congress, might well have saved the parties and the courts of Idaho most of the time and money expended in litigating the jurisdictional question in this case.

Having concluded that the legislature had not given the courts much guidance, Justice Frankfurter explicitly disavowed the attempted, subtle, case-by-case decisional process of the preceding decade.

"The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occur-

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<sup>15</sup> 359 U.S. 236 (1959).



rences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause."<sup>16</sup>

This is directly at war with the spirit of "elucidating litigation" which had animated the previous cases. But, if this were not enough, the point was emphasized as Justice Frankfurter began to review the law derived from the cases. Not all reasoning in them was of determinative importance, and much of the language used in the past did not articulate the principles upon which the decisions rested:

"We state these principles in full realization that, in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved."<sup>17</sup>

And, in any event, the process of elucidation was now over, and the court was going to state the correct rules to decide cases based on a decade's experience. *Garmon* was clearly and consciously meant to strike a new course.

But a new course as to what? The majority in today's opinion would restrict *Garmon* to cases involving picketing. Justice Frankfurter's words, however, do not support that conclusion. The issues decided by the *Garmon* case were framed as broadly as possible.

"The case before us concerns one of the most teasing and frequently litigated areas of industrial relations,

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<sup>16</sup> 359 U.S. 236, at 242.

<sup>17</sup> 359 U.S. 236, at 241.

the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. \* \* \* The extent to which the variegated laws of the several states are displaced by a single, uniform, rational rule  
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There was no broader way to frame the issue in the case. When a justice as experienced, precise and lawyer-like as was Justice Frankfurter so obviously chooses to have a case cover the most ground possible, we can only conclude that the decision to be doctrinaire was purposeful.<sup>18</sup>

Having clearly indicated that *Garmon* was to state a new rule for the entire catalogue of labor law pre-emption cases, the opinion went on to state the salient considerations which underlay the new doctrine.

"The unifying considerations of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency armed, with its own procedures and equipped with its specialized knowledge and cumulative experience."<sup>20</sup>

Citing *Garner*, the court also noted that the N.L.R.B. had as an expert tribunal, primary jurisdiction over questions within its competence.<sup>21</sup> And, most importantly, the court referred to the completeness of the federal regulatory

<sup>18</sup> 359 U.S. 236 at 241.

<sup>19</sup> See Currier, *Defamation in Labor Disputes: Preemption and the New Federal Common Law*, 53 Va.L.Rev. 1, 2, 7-14; Michelman, *supra* note 1, at 648.

<sup>20</sup> 359 U.S. 236 at 242.

<sup>21</sup> 359 U.S. 236 at 242-243, 244. The doctrine of primary jurisdiction, originally designed to protect the uniformity of Interstate Commerce Commission rules, has turned chiefly on the alleged expertness of federal administrative bodies in recent years. L. Jaffe, *Judicial Control of Administrative Action* 121-151 (1965).

scheme, the dense interrelationship between the rules, the administrative process, the expert agency and the remedies. Therefore pre-emption was necessary whenever this delicate and purposeful national law system might be encroached upon in any way.

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 . . . [or prohibited by] § 8 due regard for the federal enactment requires that state jurisdiction must yield."<sup>22</sup>

And, because it is often not clear when matters are subject to either section or are meant to be utterly unregulated and because the pre-eminent principle is complete respect for the federal scheme,

"When an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference is to be averted."<sup>23</sup>

The governing consideration was the necessity of absolute avoidance of even potential interference with federal labor policy.

There were only two narrow exceptions allowed to this rule of practically total pre-emption. The first was conduct which breached or threatened to breach the public peace. The *Laburnum* and *Russell* cases were limited in their holdings to this narrow rule. The second exception was conduct which was of only "peripheral concern" of the Act. *Gonzales* was the only case cited for this last proposition.

<sup>22</sup> 359 U.S. 236 at 244.

<sup>23</sup> 359 U.S. 236 at 245.

And, finally, *Garmon* rejected much of the reasoning in the old cases. Remedies, conflicting or otherwise, were no longer determinative. The language about conflicting remedies in *Laburnum* was explicitly rejected. It was conduct alone which was regulated. If the conduct *even arguably* came within the scope of the national policy, all adjudication about it had to be commenced in the N.L.R.B. Also the distinctions between general laws and specific labor regulation, or those based on the characterizations of the parties, juries, or state tribunals were not of importance. It was, again, state regulation of conduct—no matter on what theory—which was to be avoided. If the activities which inspired the litigation were even arguably among those which had been entrusted to the judgment of the expert National Labor Relations Board for application of the comprehensive scheme of federal rights and remedies, then jurisdiction was solely in the national board. Any intervention in such areas by the inexperienced state courts, even if the Board would not, in its discretion, choose to rule on the merits, was absolutely prohibited by *Garmon*.

The *Garmon* case, thus, represents a watershed in the jurisprudence of pre-emption. It purported to be and was a complete break with the decisions in the past. It stated a simple, omnibus rule: if conduct was even arguably subject to adjudication by the expert National Board it was ungovernable by state power. It narrowed the permissible scope of state jurisdiction to conduct which threatened good order or which was utterly irrelevant to national policy. And it foreclosed recourse to the confused jumble of cases out of which it was born. It was now to be the rule in *Garmon's* case which was to control. The preceding cases had vitality only to the extent allowed them by *Garmon*. The rule was intentionally crude, even "wooden", because it was, at least in part, designed to provide a "bright line" for deciding jurisdictional issues and, thereby, to cut off the cascade of state court litigation which the

cases through *Russell* and *Gonzales* threatened to inspire.<sup>24</sup> It is possible that in declaring this unsubtle rule in reaction to the confusion of the preceding decade, the Supreme Court of the United States was guilty of throwing out the baby with the bath water. But even if that is so, under the Supremacy Clause this court has no choice but to follow that lead. *Garmon* is absolutely the controlling case.

While it was not perfectly clear that *Garmon* was the determinative decision when this case first came before this Court over seven years ago, it is now indisputable. In the ten years since the *Garmon* decision the cases in the United States Supreme Court<sup>25</sup> and in the state courts<sup>26</sup> which recognize the supremacy of the rule in that case are legion. The most important among these for our purposes are the *Borden*<sup>27</sup> and *Perko*<sup>28</sup> cases which the majority attempts, unsuccessfully, to distinguish from *Lockridge*. Those cases did not turn on the fact of membership or non-membership in the defendant union. The touchstone in each of those cases was a denial of the rights of a union member which effectively caused that member to be deprived of employment which he otherwise

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<sup>24</sup> Currier, *supra* note 19, at 7-14; Michelman, *supra* note 1, at 648; Updegraff, *Preemption, Predictability and Progress in Labor Law*, 17 Hastings L.J. 473, 484-485.

<sup>25</sup> *E.g.*, *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, (1962); *Hanna Mining Co. v. Dist. 2, Marine Engineers Ben. Ass'n*, 382 U.S. 181 (1965).

<sup>26</sup> *E.g.*, *Cox's Food Center, Inc. v. Retail Clerks Union, Local No. 1653*, 91 Idaho 274, 420 P.2d 645 (1966); *Day v. Northwest Division 1055*, 389 P.2d 42 (Ore., 1964); *Fullerton v. International Sound Technicians*, 194 Cal.App.2d 801, 15 Cal. Rptr. 451 (1961); and cases cited in Currier, *supra* note 19, at 2 n. 7.

<sup>27</sup> *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 701 (1963).

<sup>28</sup> *Local No. 207, International Ass'n of Bridge, etc., Iron Workers v. Perko*, 373 U.S. 701 (1963).

had. The form or theory of the pleadings, whether the action sounded in contract or in tort or was a hybrid labor relations case did not matter. After *Garmon* the key to analysis, when pre-emption is urged, is the character of the *conduct*. In *Borden* and *Perko* the court catalogued the ways in which the conduct complained of could "reasonably" arguably have been characterized by the expert National Labor Relations Board as either § 7 or § 8 *conduct*. This discussion, required for decision after *Garmon*, is what the majority refers to when it says "Justice Harlan . . . pointed to many important policy questions involved in those cases which were more properly to be decided by the Board." That lengthy treatment is not needed in this instance; the majority concedes that the *conduct* complained of did indeed constitute an unfair labor practice. Following *Borden* and *Perko* and *Garmon*, that concession is all that is needed; the conduct is § 8 activity; jurisdiction is, therefore, pre-empted.

The majority, however, attempts to rely on the "distinction" which Justice Harlan drew between the *Borden* and *Perko* cases and *Gonzales*. The *Gonzales* case was different because, according to Justice Harlan, it "turned on the Court's conclusion that the lawsuit was focused on purely internal union matters."<sup>29</sup> That, the majority would urge us to believe is also true here. There are two answers to that contention. The first is to hypothesize Mr. Lockridge's answer if we were to ask him if he would like his union membership back or his seniority rights and his damages, but not both. And the second answer, a corollary of the first, is that it is impossible to say that this Court in this case has not focused sharply on *conduct* touching Lockridge's employment relation when *all* of the relief—excepting restoration of simple union membership—necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract

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<sup>29</sup> 373 U.S. 690 at 697.

between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement? And that determination is not "merely peripheral" to the Act nor is it one which involves wholly internal union matters. The conclusions which the Court has made in this case today are on precisely the sort of "difficult and complex problems" which, under the primary jurisdiction rationale of *Garmon*, are solely within the competence of the expert National Labor Relations Board. The problems of interpretation of the union charter and the bargaining contract here are no less difficult than are some of the "problems of definition" consigned to the Board in *Perko*. It is not, despite the *ipse dixit* of the majority, "obvious . . . that Lockridge was *not* subject to suspension or dismissal." And it is not for us to decide if our intrusion into the regulation of this conduct will "not militate against the discipline which is necessary to preserve the goals of concerted action, but rather militate in favor of the basic purpose for which national labor law was created." That determination, no matter what may be our own view of our competence, has been taken from us and vested wholly in the expert N.L.R.B., as a matter of federal law, under the *Garmon* rule. Whatever the current status of the *Gonzales* case might be, it is clear that the rule in the *Garmon* case, as applied in *Borden* and *Perko*, requires that the courts of Idaho refuse to assert the jurisdiction which they do not have in this case.

To make one point for a second time, the concession that the conduct regulated in this instance did probably constitute an unfair labor practice (which conclusion is not that terribly clear) should have ended this case. The statement by the majority that:

"Pre-emption is not established simply by showing that the same facts will sustain two different legal



wrongs. This would be analogous to precluding a contract action by proving the facts also establish a tort,"

grossly misinterprets the *Garmon-Perko-Borden* rule which specifically rejects the notion that what is important is the theory upon which a case is tried. The rule is if *conduct* which is to be regulated is reasonably arguably covered by § 7 and § 8 of the Act, then the jurisdiction to regulate that conduct belongs solely to the national agency.

The correct rule is clearly a crude, simple device. It fails to make subtle distinctions "in order to ascertain the precise nature and degree of federal-state conflict . . . and more particularly what exact mischief such a conflict would cause."<sup>30</sup> It is thus on purpose. It is designed to avoid the sort of confused and unbelievably protracted litigation with which we are faced in this case. It should have been allowed to have effect the first time this case came to this Court well over seven years ago. It should as a function of our position in the federal system defined by the Supremacy Clause, be given effect even now.

The Supreme Court of the United States sought for a decade to devise a better rule. It could not. The rule which we have in *Garmon* is at least easy to apply—and we should apply it. If we are unhappy with this situation we can only plead with those responsible for the dominant federal law—the United States Supreme Court, and, more importantly, the Congress—to make a change.

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<sup>30</sup> *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).



# Supreme Court of the United States

No. 1072 -----, October Term, 19 69

Amalgamated Association of Street,  
Electric Railway and Motor Coach  
Employees of America, etc., et al.,

Petitioners,

v.

Wilson F. Lockridge

Order allowing certiorari. Filed March 30 -----, 19 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of Idaho is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

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No.

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
an International Labor Union; and NORTHWEST  
DIVISION 1055 of the AMALGAMATED ASSOCIATION  
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, a Regional Division of the  
International Union, *Petitioners*,

v.

WILSON P. LOCKRIDGE, *Respondent*.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF IDAHO**

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Petitioners pray that a writ of certiorari issue to  
review the judgment and decision of the Supreme  
Court of the State of Idaho entered herein on October  
15, 1969.



### OPINIONS BELOW

The Idaho District Court Memorandum Decision of April 7, 1961, granting the motion to dismiss on pre-emption, is set out in Appendix B, p. 7a, *infra*. Neither it nor any other opinions of the Idaho District Court are reported. The opinion of the Supreme Court of the State of Idaho, reversing and remanding for trial, is reported at 84 Idaho 201, 369 P.2d 1006 (1962), and is set out in Appendix C, p. 13a, *infra*.

The Idaho District Court Memorandum Decision of December 21, 1962, striking defendants' defense on the merits, is set out in Appendix D, p. 22a, *infra*. The Idaho District Court Memorandum Decision of June 21, 1966, on the merits, is set out in Appendix E, p. 23a, *infra*; its decision on the motions to amend the findings and conclusions, of September 1, 1966, is set out in Appendix F, p. 29a, *infra*; and its Findings of Fact and Conclusions of Law, as amended, of September 1, 1966, are set out in Appendix G, p. 31a, *infra*. The opinion below of the Idaho Supreme Court has not yet been reported and is set out in Appendix H, p. 42a, *infra*.

### JURISDICTION

The judgment and decision of the Supreme Court of the State of Idaho was entered on October 15, 1969. This Court has jurisdiction to review the judgment herein by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

### QUESTION PRESENTED

Can a State Court assert jurisdiction over union conduct which is so regulated by the Congress under the National Labor Relations Act as to be certainly either protected activity or an unfair labor practice—causing an employee's discharge pursuant to

a union-security clause in a collective bargaining agreement, by advising the employer that the employee was no longer a member of the union in good standing because he had failed to tender timely the periodic dues uniformly required as a condition of retaining union membership?

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The pertinent portions of the Supremacy Clause of the United States Constitution—Article VI, Section 2—and of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*—Sections 7, 8 (a)(3), 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 157, 158(a)(3), 158(b)(1)(A), 158(b)(2)—are set out in Appendix I, p. 80a, *infra*.

### **STATEMENT OF THE CASE**

#### **The Union Conduct**

Prior to November 1, 1959, Respondent Lockridge was employed as a bus driver by the Greyhound Corporation ("Greyhound") and had been by timely dues payments maintaining his membership in good standing with the Petitioner Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("Union"). Respondent's employment was governed by a collective bargaining agreement between Greyhound and the Union which included a union-security provision requiring all employees to remain members of the Union as a condition of employment. Respondent neglected to pay his October dues by November 1, however, and in Petitioners' view, thus became delinquent in his dues payments and surrendered his membership in good standing in the Union and, accordingly, rendered him-

self liable to discharge from his employment. Consequently, the Union requested Greyhound to discharge him because he was no longer a member as the collective bargaining agreement required. Pursuant to this Union request, Greyhound discharged him, on or about November 2, 1959.<sup>1</sup>

Respondent Lockridge never filed any charge concerning this Union conduct with the National Labor Relations Board ("Board"). Rather than submitting himself to a Federal forum, Respondent Lockridge filed suit in the Idaho State District Court at Boise, in September, 1960, alleging that the Union had deprived him "of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience \* \* \*."<sup>2</sup> He alleged that the

<sup>1</sup> At the same time and for the identical reason, the Union caused Greyhound to discharge another bus driver, Elmer J. Day, a citizen of Oregon. See pp. 34a, 43a-44a, *infra*. Day's case was before this Court in No. 301, O.T. 1964, *Elmer J. Day, Petitioner v. Northwest Division 1055, etc., et al., Respondents*. The Supreme Court of Oregon had reversed the trial court's award of substantial damages, relying for this holding upon the pre-emption decisions of this Court (238 Ore. 624, 389 P.2d 42 (1964)); and this Court denied certiorari (379 U.S. 878 (1964)).

<sup>2</sup> This language appears in Count One sounding in tort and substantially identical language appears in Count Two sounding in contract based upon the International Union Constitution; in the original Complaint, filed September 27, 1960; in the Amended Complaint, filed February 15, 1961, which dropped Greyhound as a party defendant; and in the Second Amended Complaint, filed March 31, 1965, which excised certain allegations of malice. The Second Amended Complaint is set out in Appendix A, p. 1a, *infra*; see pp. 5a and 6a.

The "conduct set out in the complaint" is of prime importance in determining whether the Board has jurisdiction so that pre-emption applies, *Radio Union v. Broadcast Serv.*, 380 U.S. 255, 257 (1965), "[t]he allegations of the complaint, as well as the findings of the [State] Supreme Court \* \* \*." *Construction Laborers v. Curry*, 371 U.S. 542, 546 (1963).

Union had deprived him of his employment wrongfully in that he "was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of [the Union officer] aforesaid [in advising Greyhound he was delinquent and thus causing his discharge] were wrongful and without any lawful basis." App. A, p. 4a, *infra*.

While avoiding the use of the words "to discriminate" and "not uniformly required" which appear on the face of Section 8(b)(2) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(2), App. I, p. 81a, *infra*, Lockridge alleged that "it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof" and that the Union had acted against him "in a manner never before indulged in." App. A, pp. 4a, 5a, *infra*.

The only relief Lockridge requested was monetary damages measured by loss of employment earnings and benefits. At no time in his pleadings or during trial did he request the relief of restoration of his Union membership.

#### **District Court Dismissal, Idaho Supreme Court Reversal on Pre-Emption**

Throughout the case, the principal contention of the Petitioner Unions was that the subject matter of Lockridge's action was pre-empted by the Act and that the State Court was thereby deprived of jurisdiction. When the issue was first raised by Motion to Dismiss, the Idaho District Court dismissed on this Federal ground. App. B, pp. 8a-12a, *infra*. The Supreme Court of Idaho reversed and remanded for further proceedings, however, asserting that the Federal law

was in an "unsettled state" and therefore "We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' not 'preempted' by federal law, or, more appropriately, by the National Labor Relations Board." *Lockridge v. Amalgamated Association*, App. C, p. 20a, *infra*, 84 Idaho 201, 208, 369 P.2d 1006, 1010 (1962).<sup>3</sup>

That decision discussed and purported to be confused by this Court's decisions, *Machinists v. Gonzales*, 356 U.S. 617 (1958) ("Gonzales"), and *San Diego Unions v. Garmon*, 359 U.S. 236 (1959) ("Garmon"). It was rendered before *Plumbers' Union v. Borden*, 373 U.S. 690 (1963) ("Borden") and *Iron Workers v. Perko*, 373 U.S. 701 (1963) ("Perko"). Indeed, the Court below, for support of its 1962 judgment, *inter alia*, relied upon *United Association of Journeymen, etc. v. Borden*, 160 Tex. 203, 328 S.W.2d 739 (1959) and *Perko v. Local No. 207 of Int. Ass'n of Bridge, etc., Workers*, 171 Ohio St. 68, 167 N.E.2d 903 (1960) (App. C. at 21a, 84 Idaho at 209, 369 P.2d at 1010), which were, of course, reversed by this Court in *Borden* and *Perko*.<sup>4</sup>

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<sup>3</sup> A petition for certiorari was not filed after the 1962 decision. Cf. *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952); *Construction Laborers v. Curry*, 371 U.S. 542 (1963), which was subsequent to this Idaho Supreme Court decision.

<sup>4</sup> Prior to the trial, Petitioners filed a Motion to Dismiss, based upon *Borden* and *Perko*, which had been decided subsequent to the 1962 decision of the Court below. When the District Court denied the Motion, Petitioners moved the Supreme Court of Idaho for a writ of mandate to compel the District Court to dismiss the action on the ground that it lacked jurisdiction, in the light of *Borden* and *Perko*. In October, 1963, that Court "denied petitioners' petition for writ of mandate on the ground that the question is prematurely presented and petitioners have an adequate remedy by appeal, therefore, mandate is not available." Idaho Supreme Court No. 9393, Order of October 1, 1963. Accordingly, the issue was preserved and presented by way of appeal.

### Subsequent District Court Proceedings

After the decision by the Idaho Supreme Court, Respondent Lockridge filed his Second Amended Complaint, App. A, p. 1a, *infra*, again electing to seek damages only and not to request restoration to Union membership; and Petitioners answered on the merits. They asserted, *inter alia*, that Lockridge had failed and refused to pay his dues as required by the Union Constitution, and was consequently discharged in accordance with the collective bargaining agreement. Lockridge moved to strike this defense, and the District Court granted the motion, asserting "that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends." App. D, p. 22a, *infra*.

Subsequently, Petitioners sought leave to file Amended Answers, and accompanying Affidavits, to demonstrate that the consistent practice of the parties and their consistent interpretation of the pertinent collective bargaining agreement and International Union Constitution provisions were as the Unions alleged. But the District Court declined to permit any of this to be admitted into the record, upon the basis of its previous holding that there was no ambiguity. While persisting in the view that they acted lawfully and completely in accord with the pertinent collective bargaining agreement and Constitutional provisions, and that the Board would therefore have brought no complaint against them had Lockridge submitted his claim to it, Petitioners thereafter did not challenge this ruling.

After a trial which was devoted almost entirely to the issue of damages, but at which Petitioners renewed their motions based on pre-emption, the District Court issued a Memorandum Decision, App. E, p. 23a, *infra*.

It also issued preliminary Findings of Fact and Conclusions of Law which were amended and finalized, App. G, p. 31a, *infra*, after the parties had requested various amendments, and the Court had issued another Decision thereon. App. F, p. 29a, *infra*. The District Court made clear it still believed that the case was pre-empted, and that *Borden* and *Perko* had "greatly reinforced" Petitioners' position; and, further, that the Board plainly had jurisdiction over Lockridge's claim and that he was "partially at fault for his predicament because he did not pursue" the Board remedies available to him under the Act. App. E, pp. 26a, 28a, *infra*. Nevertheless, regarding itself constrained to proceed because of the initial decision of the Idaho Supreme Court, the District Court found that Petitioners had treated Respondent as a dues delinquent under circumstances when it would have regarded others as good standing members, App. G, pp. 35a, 39a, *infra*; that they had caused Respondent's discharge by advising Greyhound of his dues delinquency and had thus damaged him;<sup>8</sup> and it awarded damages of approximately \$32,000, measured primarily by the earnings of the driver who stood just below Lockridge on the Greyhound job seniority roster at the time of Lockridge's discharge. *Id.* at 37a, 41a; App. E, p. 27a, *infra*.

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<sup>8</sup> The pertinent Conclusion of Law was "That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and resulted in a wrongful interference with plaintiff's employment, occupation and livelihood and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish." App. G, p. 40a, *infra* (emphasis added).



Further, while recognizing that "plaintiff did not seek such a remedy" the District Court awarded him "full restoration" of Union membership. App. G, p. 41a, *infra*. In his motions addressed to the preliminary Findings and Conclusions, Lockridge requested the District Court to direct that this restoration to Union membership should be with full seniority. Astonishingly, Lockridge sought this relief from the State Court on the ground that it was routinely provided in such cases by the Board. App. F, p. 29a, *infra*. The District Court denied this request precisely on the ground that "seniority" involved the *employment* relationship. It held that granting any such relief would "clearly be in excess of [the State Court's] jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the 'Borden' and 'Perko' decisions." *Id.* at 30a.

#### Decision Below

Petitioners' appeal to the Supreme Court of Idaho, based solely on pre-emption, was rejected in a 4-1 vote. On Lockridge's cross-appeal, the Idaho Supreme Court added to his damages and directed he be restored with full seniority. As the majority and dissenting opinions demonstrate, App. H, pp. 42a, 64a, *infra*, the Court below was divided on whether the pre-emption principles declared by this Court, particularly in *Garmon*, *Borden* and *Perko*, deprived it of jurisdiction in this case. The dissenting Judge sought to honor those decisions enforcing pre-emption principles; but the majority upheld Idaho State Court jurisdiction, even though (1) it paid lip service to the pre-emption principle established by this Court that the State Courts lacked jurisdiction over union conduct which was even "arguably"



an unfair labor practice (App. H, pp. 55a-58a, *infra*); and (2) it held that the Union conduct involved was "most certainly" an unfair labor practice subject to the jurisdiction of the Board under the Act (*id.* at 51a).

The majority sought to insulate this case from the pre-emption decisions of this Court by treating it as though it involved only Lockridge's Union membership and did *not* involve his employment relationship. But the majority's own recital of the facts refers prominently to the employment relationship and the collective bargaining agreement between Greyhound and the Union. App. H, pp. 43a-44a, 47a-48a, 50a, 60a-62a, *infra*. As the dissent pointed out, this was certainly an employment relationship case because all of the relief except restoration to union membership "necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement?" *Id.* at 78a. The majority held that Lockridge should be "restored by the appellant union to full seniority rights", *id.* at 62a, simply failing to recognize or mention that "seniority" has nothing to do with union membership and relates solely to length of *employment*. Indeed, as we have seen, the District Court held it lacked jurisdiction to award seniority for precisely this reason. App. F, pp. 29a-30a, *infra*.

In addition, the majority distorts the pleadings and record of his case, in characterizing this as an "Action by a former member of a labor union against the union

for reinstatement to membership," App. H, p. 42a, *infra*, and in asserting that "The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*." *Id.* at 52a (emphasis in original). In fact, as noted above, at no time in his pleadings or at trial did Lockridge request the relief of restoration to Union membership.

While purporting to deny conflict with the decisions of this Court, the majority below explicitly acknowledged direct conflict with the decision of the Supreme Court of Oregon involving the other Greyhound employee discharged as a consequence of this identical Union conduct, see n.1, *supra*: "The result we reach is contrary to that reached in *Day v. Northwest Division 1055, et al.*, 389 P.2d 42 (1964)." App. H, p. 59a, *infra*.

### REASONS FOR GRANTING THE WRIT

**I. THE DECISION BELOW IS IN SQUARE CONFLICT WITH THE PRE-EMPTION PRINCIPLE CLEARLY AND CONSISTENTLY ESTABLISHED IN MANY DECISIONS OF THIS COURT, PRINCIPALLY *GARMON*, *BORDEN* AND *PERKO*.**

**A. This Court Has Repeatedly Held That State Courts Can Assert No Jurisdiction Over Union Conduct Which Is Even "Arguably" Subject to the Jurisdiction of the Board as Either Protected Activity or an Unfair Labor Practice.**

There is no principle of Constitutional and labor law which this Court has set forth with greater clarity and consistency than the principle that State jurisdiction must yield where union conduct is even "arguably" subject to the jurisdiction of the Board, either as an activity which is protected, or an unfair labor practice which is prohibited, by Congress in the Act. This fundamental standard was clearly and definitively elucidated in *Garmon* and has been consistently applied

in pre-emption cases. In *Borden*, for example, in which this Court was concerned with the identical statutory provisions which are central in this case, Sections 8(b)(1)(A) and 8(b)(2) of the Act, the Court declared:

“Notwithstanding the state court’s contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent’s actual or believed failure to comply with internal union rules, it is certainly ‘arguable’ that the union’s conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8(a)(3).” 373 U.S. at 694 (emphasis in original).

For this reason, the Court reversed a State Court upholding an employee-member’s recovery against his union such as was obtained in this case. To invoke the rule of pre-emption foreclosing State Court jurisdiction, this Court declared, “It is sufficient \* \* \* to find, as we do, that it is reasonably ‘arguable’ that the matter comes within the Board’s jurisdiction.” *Id.* at 696.

This Court then turned to Borden’s contention that the State Court should be held to have jurisdiction by virtue of *Gonzales*,<sup>6</sup> in general the identical contention

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<sup>6</sup> The record in *Gonzales* (No. 31, O.T. 1957), shows that plaintiff’s allegations and proofs centered on formal internal union proceedings. *Gonzales* was brought up on charges within the Machinists’ Union for “unbecoming conduct” based on his filing suit for assault and battery against a particular union official, allegedly without any basis. Further, after being found guilty by a Trial Board, *Gonzales* was exonerated by his Local. Only upon reconsideration was he found guilty and ultimately sentenced to paying

relied upon by Respondent and by the Court below. Rejecting this contention, this Court pointed out that *Gonzales* was a suit by an individual "who was seeking restoration of membership" (*id.* at 696); and definitively distinguished *Gonzales* as follows:

"The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on *purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights.* In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.

\* \* \*

a fine and apologizing. The State Courts found that this reconsideration was a violation of the applicable union procedural provisions. When *Gonzales* refused to comply with the verdict, he was expelled from membership. He then found himself unable to obtain employment, not because his discharge was procured, but because this was a "hiring hall" situation, and he was not referred by the union and not accepted by employers when he applied directly. According to the Brief filed on behalf of *Gonzales*, "There is no evidence in the record that the union caused or attempted to cause employers not to hire respondent. The evidence showed only that the union refused to dispatch the respondent." Brief for Respondent, No. 31, O.T. 1957, p. 11. "Further, the state court did not deal at all with any act of the union which caused employers to discriminate against *Gonzales*." *Id.* at p. 16.

In every particular, this case is in contrast with *Gonzales*. In this case, plaintiff did not request restoration to Union membership; there were no formal, internal union proceedings, no charges, no trial, no rehearing, no expulsion, and no hiring hall. Here, the *crux* of the damages sought and obtained by Lockridge is not the loss of advantage in seeking employment generally, but the damages flowing from the loss of one particular job by the Union conduct causing his discharge. Here, Lockridge's claim is precisely that the Union caused Greyhound to discriminate against him by discharging him from his bus driver's position.

*"The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action \* \* \* concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction." Id. at 697 (emphasis added).*

Identically with *Borden*, this case was not focused on "purely internal union matters," and the principal relief sought was certainly not restoration to Union membership for that relief was not even requested by Respondent Lockridge. This case was focused principally on Petitioner Unions' actions in matters having to do most directly with matters of employment: Petitioners procured the discharge of Respondent from his employment, and the sole relief Respondent sought in this case was monetary damages resulting from his loss of that employment. The crux of this action concerns Respondent Lockridge's employment relations and involves union conduct which, under his allegations and the State Court's findings, certainly, and not merely arguably, was an unfair labor practice subject to Board jurisdiction.

Likewise, in *Perko*, a companion case to *Borden*, the suit against the union in fact involved interference with the plaintiff's employment rights; and this Court reversed a judgment in damages sustained by the State Court. "As in *Borden*," the Court held, "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters."

373 U.S. at 705. The Board might find that Perko was covered by the Act and "Perko's complaint—that the [Union] caused his discharge and prevented his subsequent employment \* \* \*—falls within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8(b)(2) of the Act." *Id.* at 706-707 (emphasis added).

Identically with *Perko*, in this case the State Courts asserted jurisdiction and awarded damages upon the claim that the Petitioner Unions caused plaintiff's discharge and prevented his future employment, union conduct which falls within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8(b)(2) of the Act. As in *Garmon* and *Borden*, the judgment of this Court, which should govern this case, was expressed in *Perko* as follows: "It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be *Reversed*." *Id.* at 708 (emphasis in original).

Many decisions of this Court have reiterated and applied this identical standard; e.g., *Radio Union v. Broadcast Serv.*, 380 U.S. 255 (1965); *Hattiesburg Unions v. Broome Co.*, 377 U.S. 126 (1964) (summary reversal); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964); *Construction Laborers v. Curry*, 371 U.S. 542 (1963); *Ex parte George*, 371 U.S. 72 (1962) (summary reversal); *Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962); see also *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 375, 381, 383, n.19, 385 (1969); *Linn v. Plant Guard Workers*, 383 U.S. 53, 59 (1966); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 187-

188 (1965); *In re Green*, 369 U.S. 689, 692-693 (1962). Accordingly, this Court has established and has emphasized, time after time, surely so clearly and consistently that litigants and State Courts throughout the nation who were able and willing to read should have learned it, the black-letter rule of Constitutional and labor law that State Courts cannot assert jurisdiction over union conduct which is even arguably an unfair labor practice under the Act.

**B. The Union Conduct Involved in This Case Is Certainly Subject to the Jurisdiction of the Board.**

Inasmuch as even the majority below recognized that the Union conduct at bar was regulated by the Act and was subject to Board jurisdiction, there could be no plainer case than this of conflict with the pre-emption rule of law maintained by this Court. In any event, the text of the Act and the many consistent judicial and administrative decisions interpreting it demonstrate that Federal regulation has blanketed all discharges under a union-security clause caused by a union's asserting that the employee has failed to tender timely the periodic union dues uniformly required.

Section 8(b)(2), the principal statutory provision involved, plainly creates two different unfair labor practices, one specific and one general, but both related to union discrimination against an employee with respect to whom union membership has been terminated on any ground *other* than his failure to tender the periodic dues uniformly required. The first is specific, causing an employer to take discriminatory action against an employee under a union-security clause on any such other ground; and the latter is general, encompassing any discrimination on any such other



ground.<sup>7</sup> The statutory provisions, reading in terms of (1) protecting the union activity in all cases validly based on failure to tender periodic dues uniformly required and (2) prohibiting the union activity as an unfair labor practice in all *other* cases, ineluctably embrace the entire area of discharges under a union-security clause based on alleged failure to tender dues.<sup>8</sup> See, generally, *Radio Officers v. Labor Board*, 347 U.S. 17, 40-42 (1954). All cases involving such union conduct must fall to one side or the other of the legal fence; Congress left no room for muggumps. On the touchstone of whether the union conduct in obtaining the discharge was actually in fact and validly in law on the ground of delinquency in dues payments, the case must legally be consigned to either the "protected" or the "prohibited" categories of union conduct defined in the Act.

There is a plethora of Board cases involving such union conduct under § 8(b)(2) and related provisions

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<sup>7</sup> Section 8(b)(1)(A) establishes an even broader union unfair labor practice, including the particular conduct proscribed in § 8(b)(2) and, in addition, any other conduct impairing an individual's rights under the Act. Petitioners' conduct as found by the Courts below was thus a violation of § 8(b)(1)(A) as well as § 8(b)(2). It bears reiteration that these are precisely the Sections of the Act involved in *Borden* and *Perko*.

<sup>8</sup> Inasmuch as Congress has thus regulated the entire field of this particular union conduct, it is closed to any State regulation or jurisdiction. See, e.g., *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Bus Employees v. Missouri*, 374 U.S. 74 (1963); *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1953); *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *Automobile Workers v. O'Brien*, 339 U.S. 454 (1950). This Congressional occupation of the field is an additional, separate and distinct, ground requiring the pre-emption of State jurisdiction in this case. Cf. *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383, n.19 (1969).



of the Act.<sup>9</sup> In virtually all of them, the union's advising the employer that the employee is delinquent in his dues payments and has thus surrendered his union membership under the union's internal rules is the cause of the resulting loss of employment.<sup>10</sup>

<sup>9</sup> For a complete catalogue of the cases, see, e.g., American Digest System, Labor Relations, Key Numbers 368, 395 (West Publishing Company); Cumulative Digest and Index, LRRM, §§ 59.230-59.231 (Bureau of National Affairs); Labor Law Reporter Par. 4525 (Commerce Clearing House).

<sup>10</sup> The union conduct of causing a discharge for dues delinquency is presumptively a violation of the Act; showing that the statutory exception is applicable—that the discharge was in fact for failure to tender the uniform periodic dues and was in compliance with a valid union-security clause—is a matter of affirmative defense. See, e.g., *Marble Polishers, Etc., Local No. 121*, 132 NLRB 844 (1961); *Local 84, International Ass'n. of Bridge*, 129 NLRB 971 (1960). Moreover, the burden of proof on the issue of whether an action which would otherwise violate § 8(b)(2) is made lawful and protected by the proviso is on the party accused of the violation. See, e.g., *Local 545, Operating Engineers*, 161 NLRB 1114, 1119 (1966); *Operative Plasterers, Etc. Local No. 2*, 149 NLRB 1264, 1281-1282 (1964). In a case where dues payments are contested, the Board must first consider, in a case of this sort, "whether the dues delinquencies existed in fact." *United Sugar Workers Union, Local 9*, 149 NLRB 154, 160 (1964). As was held in *International Union of Electrical, R. & M. Wks. v. N.L.R.B.*, 113 U.S. App. D.C. 342, 347, 307 F.2d 679, 684 (1962), *cert. denied*, 371 U.S. 936 (1962) (emphasis in original), "the Board was not required to make an affirmative determination that all or any of these factors [personal hostility] comprised the actual basis or motivation for the Union's demand for [the employee's] discharge. No affirmative finding as to the cause of discharge is needed. Under the language of the statute the Union commits an unfair labor practice when it causes an employer to discriminate against an employee 'on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required \* \* \*.' " Indeed, even if the employee was in fact delinquent, the Union has the additional obligation of showing that it fully apprised him of his dues status. See, e.g., *N.L.R.B. v. Hotel, Motel and Club Employees' Union, Local 568*, 320 F. 2d 254 (3rd Cir. 1963); *International Union of Electrical, R. & M. Wks. v. N.L.R.B.*, *supra*.

To adjudicate whether or not an unfair labor practice has been committed, the Board must determine the actual dues status of the member and its application to his employment status under the collective bargaining agreement; and thus must invariably investigate and interpret the pertinent union dues rules and practices and the pertinent provisions of the agreement—precisely the same matters which the State Courts adjudicated in this case.<sup>11</sup> Manifestly, the substantive

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<sup>11</sup> Even the majority below recognized that *Krambo Food Stores, Inc.*, 114 NLRB 241 (1955), *enforced sub. nom. N.L.R.B. v. Allied Independence U.*, 238 F.2d 120 (7th Cir. 1956) was an illustration of the Board's concerning itself with the very issues of interpretation of a Union Constitution with which the State Courts were here concerned. App. H, p. 51a, *infra*. The Board in *Krambo*, after considering the Union Constitution and practice, found that the member employees had indeed paid dues within the time allowed by the Union Constitution; and concluded:

"As the complainants were discharged during the 30-day grace period at the request of the Union, their discharge constituted a discriminatory denial to the complainants of the grace period allowed them for the payment of dues by the Union's constitution.

"Accordingly, we find the Respondent Union violated Section 8(b) (2) in that it did cause the Respondent Company to discriminate against employees [named] by terminating their employment on some ground other than the failure to tender the periodic dues uniformly required as a condition of retaining membership in the Union." 114 NLRB at 243-244.

Additional cases in which the Board interpreted dues provisions of the Union Constitution in applying § 8(b) (2) include: *N.L.R.B. v. Leece-Neville Company*, 330 F.2d 242 (6th Cir. 1964), *cert. denied*, 379 U.S. 819 (1964); *N.L.R.B. v. Shear's Pharmacy, Inc.*, 327 F.2d 479 (2nd Cir. 1964); *N.L.R.B. v. Spector Freight System, Inc.*, 273 F.2d 272 (8th Cir. 1960), *cert. denied*, 362 U.S. 962 (1960); *Communications Workers of America v. N.L.R.B.*, 215 F.2d 835 (2nd Cir. 1954), *enforcing New Jersey Bell Telephone Company*, 106 NLRB 1322 (1953).

A union's good faith belief that its action is proper under the collective bargaining contract is no defense to this charge of unfair labor practice. See, e.g., *Local 140*, 109 NLRB 326, 328-329 (1954); *Plywood Workers Local Union No. 2498*, 105 NLRB 50, 55-56 (1953).

issues in this case would present only an ordinary, run-of-the-mine §§ (b)(2)-8(b)(1)(A) case to the Board. The legal characteristics of this case are homogeneous with these Board cases. There is no unique attribute of the circumstances at bar which can justifiably segregate this case from the routine §§ 8(b)(2)-8(b)(1)(A) Board case.

Accordingly, this is the most glaring possible State Court violation of the *Garmon-Borden-Perko* preemption principles declared by this Court. Vindication of those principles, of bedrock import in the Federal System, demands the most expeditious reversal of the judgment and decision below.

**II. THE DECISION BELOW IS IN SQUARE CONFLICT WITH A DECISION OF THE OREGON SUPREME COURT INVOLVING THE IDENTICAL UNION CONDUCT.**

At the same time that they caused Greyhound to discharge Lockridge, Petitioners caused the discharge of another Greyhound driver, Elmer J. Day, on exactly the same ground of Union dues delinquency. The State District Court's unchallenged finding on this record was, "One Elmer Day was likewise suspended under *identical circumstances*." App. G, p. 34a, *infra* (emphasis added).

Unlike Lockridge, Day did first file a charge against the Union with the Board. After investigation, the Board dismissed the charge because there was "insufficient evidence of violations \* \* \*." See p. 46a, n. 2, *infra*. Thus the Board evidently concluded that Petitioners had acted lawfully, while the Idaho Courts concluded that they had acted unlawfully. There could be no more vivid illustration of contention and

inconsistency between Federal and State authority which it is the very purpose of the pre-emption doctrine to avoid.

After the Board ruled he had no case against the Union, Day filed suit in the Oregon Courts. The Oregon trial court held it had jurisdiction, despite the plea of pre-emption, and Day recovered a substantial jury verdict. The Oregon Supreme Court reversed, holding that the case was indeed pre-empted and that the State Courts could assert no jurisdiction, primarily because such a result was held required to comply with this Court's decisions in *Borden* and *Perko*. 238 Ore. 624, 389 P.2d 42 (1964). Day petitioned for a writ of certiorari, contending that the Oregon Supreme Court misconceived the Federal law; but this Court denied the writ. 379 U.S. 878 (1964); No. 301, O.T. 1964. In *Day* the Oregon Supreme Court held that, under the Act:

"a union may lawfully require an employer to discharge an employe for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. If the request for discharge has been honest and for the actual reason assigned, the union and employer are within their rights and it is held that no unfair labor practice has occurred. But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.

"*Garmon, supra. Borden* and *Perko* all tell us that if the conduct alleged 'may reasonably be

asserted to be subject to Labor Board's cognizance, then the courts, both state and federal, are without any right to proceed. In this case the Board does reasonably have cognizance of the question at issue and we must desist from further proceedings." 238 Ore. at 627, 389 P.2d at 44.

Manifestly, there is irrepressible conflict between the Oregon judgment in *Day* and the Idaho judgment in this case. While both decisions purport to apply the identical Federal law, pronounced in the identical decisions of this Court, to the identical union conduct, *Day* subordinates Oregon law to Federal jurisdiction, while the decision below renders Idaho law supreme over Federal law. *Day* is in allegiance to the pre-emption decisions of this Court. The decision below is in rebellion against them. This Court should not permit such a conflict to go unresolved nor the defiant decision below to long endure.

**III. THIS COURT SHOULD SUMMARILY REVERSE THE JUDGMENT BELOW WHICH STANDS IN OUTRIGHT DEFIANCE OF FUNDAMENTAL CONSTITUTIONAL AND NATIONAL LABOR POLICY PRE-EMPTION PRINCIPLES.**

The judgment below appears to be a deliberate confrontation with the pre-emption decisions of this Court. Especially by contrast with the dissent which persuasively demonstrates that those decisions absolutely govern this case, the majority opinion below reads as though the Supreme Court of Idaho is bent upon testing just how far this Court will permit it to go in disregarding their text as well as their teaching. In outright defiance of this Court's repeated declarations that a State Court may exercise no jurisdiction over union conduct which is even "arguably" an un-

fair labor practice under the Act, the majority brazenly at one and the same time both asserts jurisdiction over Petitioners' conduct *and* holds that that conduct "most certainly" constituted an unfair labor practice subject to Board jurisdiction under the Act!

A State Supreme Court decision thus according supremacy to State over Federal law is at war with the mandate of the Supremacy Clause that Federal law shall be accorded the sovereign rank throughout the United States. Any such decision cannot survive. So long as it stands, it will breed litigation in disregard and derogation of Federal law, litigation now stilled by the settled pre-emption and Supremacy standards. Especially must a State decision in defiance of the Supremacy Clause be reversed when the State Supreme Court has presumed to impose State jurisdiction upon activity which Congress has regulated by uniform national policy, in this case union conduct regulated in the Act. The Act is "of course the law of the land which no state law can modify or repeal," *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967), "[a] national system for the implementation of this country's labor policies \* \* \*," *id.* at 239, a national system of substantive law and, in addition, prescribing a "centralized administration of specially designed procedures [which Congress considered] was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies," *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953), a national system in which "Congress has expressed its judgment in favor of uniformity." *Guss v. Utah Labor Board*, 353 U.S. 1, 10-11 (1957).

The decision below purports to accomplish precisely that which Congress and this Court have forbidden, different labor policies and labor laws being enforced throughout the land, emanating from the varying local attitudes towards labor controversies, thwarting uniform administration and enforcement of the National system for the implementation of this country's labor policies. In short, Idaho is here seeking to secede from that National system.

The contumacy of the decision below is exacerbated by the fact that it does not mark the first time that the Idaho Supreme Court has flung down the gauntlet to this Court on pre-emption. Two of its prior decisions flaunting the pre-emption decisions of this Court have resulted in summary reversals. *Retail Clerks International Association, Local No. 560 v. J. J. Newberry Company*, 352 U.S. 987 (1957), summarily reversing 78 Idaho 85, 298 P. 2d 375 (1956); *Pocatello Building & Construction Trades Council v. C. H. Elle Construction Co.*, 352 U.S. 884 (1956), summarily reversing 77 Idaho 514, 297 P.2d 519 (1956). Now, even after *Garmon*, *Borden*, *Perko* and subsequent decisions of this Court have, time after time, defined the legal standard which must govern the State Courts on pre-emption, the Court below yet again seeks to arrogate for itself the right to declare Idaho law an exception to the rule of Federal law. This bold new uprising should likewise be scotched by summary reversal.



**CONCLUSION**

For the reasons stated herein, this Petition should be granted, and the judgment and decision below summarily reversed.

Respectfully submitted,

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APPENDIX

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**APPENDIX A**

**Second Amended Complaint**

[Filed March 31, 1965]

[Original Complaint Filed September 27, 1960.  
Amended Complaint Filed February 15, 1961.]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Civil No. 30613

WILSON P. LOCKRIDGE, *Plaintiff*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY  
AND MOTOR COACH EMPLOYEES OF AMERICA, an Inter-  
national Labor Union; and NORTHWEST DIVISION 1055  
of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a  
Regional Division of the International Union,  
*Defendants.*

**SECOND AMENDED COMPLAINT**

COMES Now plaintiff above named and for cause of action  
against defendants and each of them, complains and alleges  
as follows:

COUNT ONE:

I

That the defendant, Amalgamated Association of Street,  
Electric Railway and Motor Coach Employees of America,  
hereinafter referred to as the International Association, is  
an organized association having as members various work-  
men skilled and trained in operating passenger motor  
busses including those owned and operated by Greyhound  
Corporation throughout the State of Idaho. That said

International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association and the various regional divisions.

## II

That the Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as Division 1055, is a regional division of the International Association and includes as members thereof all members of the International Association who live and work within the regional boundaries of Division 1055. That said Division 1055 has its own duly elected officers but that all members of Division 1055, and the officers thereof, as members of the International Association, are subject to ultimate authority and control of the International Association and are all subject to ultimate authority and control of the International Association and are all subject to the constitution and general laws of the International Association.

## III

That the International Association, through its international officers and officers and agents of Division 1055, have conducted and are conducting business within the State of Idaho and at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of said International Association, Division 1055 and the members of the International Association. That many members of the International Association and Division 1055 thereof live in and are employed within the State of Idaho. That the International Association and regional division are the exclusive representatives of all members of the union for the purpose of collective bargaining relative to conditions of employment and for negotiation and execution of con-

tracts with employers pertaining to such matters, and officers and agents of the International Association and Regional Division 1055 come into the State of Idaho to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of its members. That by the constitution and general laws of the International Association, said association and the regional division in which the member resides are irrevocably authorized to act as agents for all members before any committee, board of arbitration, arbiter, court or any tribunal in any matter affecting members' status as an employee and to represent and bind the members in the presentation, prosecution, adjustment and settlement of grievances, complaints and disputes arising out of the members' employment relationship.

#### IV

That since on or about May 16, 1943 and to and including on or about November 2, 1959, plaintiff was a member of the International Association within the area of Regional Division 1055 thereof, and was employed as a bus driver for Greyhound Corporation, a private corporation having as its main business purpose, the operation of public busses. That all drivers of Greyhound busses, and other public bus lines, are members of the International Association and no person can be employed as a bus driver nor retain such employment unless he is a member of said International Association. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver with Greyhound Corporation and under contracts between the International Union, its regional divisions and Greyhound Corporation, seniority in said employment has commensurate therewith benefits in working conditions and compensation.

#### V

That prior to November 2, 1959, C. A. Bankhead, Treasurer and Financial Secretary of Division 1055, acting

for Division 1055 in his official capacity as such Treasurer and Financial Secretary, and acting for and on behalf of the International Union and the officers thereof, suspended plaintiff from membership in the union on the basis that the plaintiff was in arrears in his payment of dues contrary to the requirements of the constitution and laws of the union and thereafter notified Greyhound Corporation that plaintiff was no longer a member in good standing of the union and requested said Greyhound Corporation to remove plaintiff from employment. That immediately following the receipt of such notice, on or about November 2, 1959, said Greyhound Corporation discharged plaintiff from employment. That plaintiff was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of said Bankhead, aforesaid, were wrongful and without any lawful basis. That additionally, it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof.

## VI

That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of age, earning in his employment an average of approximately \$7,200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future for the next 20 years and until he became 65 years of age, in excess of \$7,200.00 per year, and additionally, at the age of 65 years would have been able to retire with retirement pay of approximately \$3,600.00 per year.

## VII

That in suspending plaintiff from membership in the International Association which resulted in plaintiff's loss

of employment, the defendant International Association and Division 1055, acting by and through their duly authorized officers and agents, acted wantonly, wilfully and wrongfully and without just cause, and to plaintiff's knowledge, in a manner never before indulged in, and have deprived plaintiff of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience, and plaintiff has been harassed and subject to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

### VIII

That in suspending plaintiff from membership in the International Association as aforesaid, said International Association and Regional Division 1055 thereof, acting through its officers and agents, acted contrary to all custom within said union since, to plaintiff's knowledge, no member of said union, within Region 1055, had heretofore been so suspended for arrears in dues and said International Association and Division 1055 thereof, acting by and through its duly authorized officers and agents, proceeded contrary to the constitution and laws of the International Association and precluded plaintiff from any remedy he may have under said constitution and laws. That nevertheless plaintiff did all things and performed all acts which would have been required of him under the constitution and laws had the International Association and Division 1055 acted in conformance with the requirements of the constitution and laws of the union, but to no avail. That further, any acts on the part of the plaintiff for reinstatement to membership were and would have been useless procedures on his part, it being the attitude of the officers of the International Association and Division 1055 that plaintiff would not be reinstated to membership in the International Association under any circumstances.

## COUNT TWO:

## I

Plaintiff repeats and realleges all of the allegations contained in paragraphs I, II, III, IV, V, VI and VIII of Count One.

## II

That section 83 of the constitution and general laws of the International Association provides that no member shall be allowed to injure the interests of a fellow member by undermining him in place, wages or in any other wilful act by which the reputation or employment of any member may be injured. That in wrongfully suspending plaintiff from membership in the International Association, which resulted in plaintiff's discharge from employment with the Greyhound Corporation, the defendant International Association and Regional Division 1055 thereof, acting by and through its authorized officers and agents, acted wrongfully, wantonly, wilfully and maliciously and without just cause and violated the constitution and general laws of the International Association which constituted a contract between the plaintiff as a member thereof and the International Association, and as a result of said breach of contract plaintiff has been deprived of his livelihood and all benefits from his employment with said Greyhound Corporation that have accrued and would accrue to him by reason of such employment, his seniority and experience and plaintiff has been embarrassed and subjected to mental anguish, all to plaintiff's damage in the sum of \$212,200.00.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, for the sum of \$212,200.00, together with costs and disbursements incurred herein and such other and further relief as to the court may appear meet and equitable in the premises.

ANDERSON, KAUFMAN AND ANDERSON

/s/ SAMUEL KAUFMAN

A member of the Firm

501 Idaho Bldg., Boise, Idaho

*Attorneys for Plaintiff*



## APPENDIX B

## District Court Memorandum Decision

[Filed April 7, 1961]

. . . . .

This matter is before the Court pursuant to motions by the defendant under the provisions of Rule 12 (b) I.R.C.P. The defendant Greyhound Corporation of America has been dismissed, and plaintiff has filed an amended complaint against the remaining defendants. Thus, only the motions of Amalgamated Association and the Northwest Division 1055 of the Amalgamated Association are before the Court. It has been stipulated that the motion to dismiss directed to the first complaint, may be considered as directed to the amended complaint of plaintiff.

Paragraphs I and II of the motion are to quash the return of service of summons and dismiss the action against Northwest Division and Amalgamated Association on the ground of improper service or service which did not give the Court jurisdiction of these parties. I am of the opinion that these motions are not well taken, for the reasons set forth by plaintiff in his original memorandum in this case, pages 1 through 5.

Paragraph III is that the complaint fails to state a claim upon which relief can be granted. The serious objection here raised, is that defendant has not alleged an exhaustion of remedies within the internal organization of defendant unions. While this may represent a condition precedent, which must be proved, I am of the opinion that under our system of notice pleading, plaintiff's allegations that the defendant unions precluded him from any remedy he might have in the union and that he did all things required of him under the union constitution, and that any further proceedings would have been useless, is sufficient as against a motion to dismiss. Thus, I am of the opinion that this



complaint does state a claim upon which relief could be granted, and therefore paragraph III will be denied.

Paragraph IV of the motion contends that the counsel of Western Greyhound Amalgamated Divisions is an indispensable party to the action not within the jurisdiction of the Court, because it is the party which made a collective bargaining agreement with the Western Greyhound Lines. As the case is now pled, if it is not pre-empted, it must rest upon a ground which does not involve an unfair labor practice. Thus the Council of Western Greyhound Amalgamated Divisions is not an indispensable party. Therefore Paragraph IV of the motion will be denied.

Paragraph V of the motion will be denied, for the reasons stated in open court when the matter was argued. See Rule 8 (e) 2 and Rule 18 (a) I.R.C.P.

Paragraph VI of the motion to dismiss raises by far the most difficult problem. This is a contention by the defendants that the matters alleged by plaintiff constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board (Title 29 U.S.C.A. Par. 157 and 158). If this contention is correct, then the matters involved in this case have been pre-empted by operation of Federal law. Plaintiff, on the other hand, contends that the matters alleged involve private right of the plaintiff, and in essence it actually is an action for breach of a contract between plaintiff and defendants, the contract in question being the constitution of the union.

The state courts, the lower Federal courts, and the U.S. Supreme Court have had great difficulty in defining the areas which have been pre-empted by the N.L.R.A. In my opinion the state Court opinions are impossible to reconcile, as are the U.S. Supreme Court opinions. However, the U.S. Supreme Court in *San Diego Buildings Trade Council v. Garmon*, 359 U.S. 236, 3 Law Ed. 2d, 775, 75 Sup. Ct. 772, has made an attempt to finally define this

question and has in effect narrowed or overruled some of its earlier decisions in this matter. In this so-called second Garmon decision, the Supreme Court of the United States, after stating that the policy of Congress has been to centralize labor-management relations in the N.L.R.B. as a matter of national policy, and that "when the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting", designates only two areas in which the power of the states to regulate industrial relations have not been pre-empted.

These are matters which are of "merely peripheral concern" to labor-management relations. The only example of this type of situation is *Association of Machinists v. Gonzales*, 356 U.S. 617, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923.

Secondly, matters "deeply rooted in local feeling and responsibility." I.e., violence and breaches of the peace. The Court cites as an example only *International Union v. Russell*, 356 U.S. 634, 2 Law Ed. 2d 1030.

The Court then goes on to say that if a matter is "arguably" within paragraph 7 or paragraph 8 of the N.L.R.A. then the state courts, as well as the federal courts, must defer to the N.L.R.B. and that the N.L.R.B. itself is the agency which must determine in the first instance whether a matter is an unfair labor practice or not.

Thus it seems to me that the present rule is, that the state or federal court must first determine whether a case falls clearly in or out of the exclusive jurisdiction of the N.L.R.B. If it is clearly outside, the courts can take jurisdiction. If it is clearly within the N.L.R.B.'s exclusive jurisdiction or is in the twilight zone, then the courts, both state and federal, must await determination by the administrative board as to whether the matter is deemed by it to

be within its jurisdiction. Justice Harland [sic] in his dissenting opinion to the Garmon case states as much.

“Henceforth the states must vithhold access to their courts until the N.L.R.B. has determined what unprotective conduct is not an unfair labor practice.  
• • •”

It was clear that plaintiff in his original complaint alleged an unfair labor practice against Greyhound Corporation under Section 158, 29 U.S.C.A., and his terminology in his first complaint as it related to the actions of defendant union clearly indicated an unfair labor practice. In that complaint, the plaintiff several times alleged that all of defendants' acts were for the purpose of seeking a discriminatory discharge by his employer. The gravamen, it seems to me, of his present pleading is the same, in that he alleges that the defendant union wrongfully expelled him for alleged failure to pay dues; that as a result of his expulsion he lost his employment with Greyhound Corporation and to his damage. There is a clear inference that the union did this to make an example of him and to cause him to lose his employment, rather than to collect dues. If this is the claim, it is at least arguable that this constitutes an unfair labor practice. If plaintiff were seeking reinstatement in the union, such as was done in the Gonzales case, together with loss of wages during the period of his wrongful expulsion and other incidental damages, such as his claimed punitive damages and mental pain and suffering, he would have been bringing an action to assert his rights as a member of the union against the union. However, he goes far beyond this, although it would appear that reinstatement would afford him a full remedy in that it does not appear that he could not get his job back if he were reinstated. In this case plaintiff seeks to recover damages for future loss of gainful employment and the allegations would fit a tort claim for total future disability for gainful employment. It seems obvious that he is not

interested in getting back his job or asserting his union rights.

Under the rule announced by Judge Cohen in *Wax v. International Mailers Union*, 161 A2d 603 (Pa.), (whose analysis of the Garmon decision agrees with mine) plaintiff is asserting an unlawful labor practice, because he is seeking damages based upon *injuries to his employment*, as distinguished from damages based upon *injury to his rights as a union member*.

Further it appears to me that plaintiff in paragraphs I, II, III, IV, V, VI and VIII of all these counts of his amended complaint, has alleged an unlawful labor practice upon the part of the union, which is at the very least arguably within the provisions of Sections 7 and 8 of the N.L.R.A. It falls under the statement made by an annotation in 4 L. Ed. page 2022:

“Under the terms of Par. 8 (a) (3) of the amended National Labor Relations Act, unions and employers are permitted to agree that union membership shall be a condition of employment; but a proviso to par. 8 (a) (3) bars an employer who has entered into such an agreement from discriminating against an employee for nonmembership in a union if he has reasonable grounds for believing that membership was not available to the employee in question on the same terms and conditions generally applicable to other union members, or if he has reasonable grounds for believing that the membership of the employee in question was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining union membership. A complementary provision appears in par. 8 (b) (2) of the act, which specifies that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee who has been

denied, or ousted from, union membership on grounds other than his failure to tender uniformly required dues and initiation fees."

Thus it seems clear to me that plaintiff alleges that defendants had entered into a lawful union security contract with plaintiff's employer Greyhound; that the plaintiff's alleged failure to pay dues when due was the claimed cause of his loss of union membership, but that the real cause was something else, and that in fact the union had waived its right or is estopped to assert its right to deny him membership on this ground; that it in effect caused plaintiff's employer to discriminate against him on grounds other than failure to tender uniformly required dues; that this constitutes an unfair labor practice and that jurisdiction of this type of situation has been taken by the N.L.R.B. in this type of situation is illustrated by the cases appearing in the above cited annotation. In particular see cases listed under 9th Circuit.

I therefore conclude that defendants' motion to dismiss on the ground that the courts of Idaho lack jurisdiction, should be granted.

Dated this 7th day of April, 1961.

/s/ MERLIN S. YOUNG  
District Judge

**APPENDIX C**

**Idaho Supreme Court Decision**

[Filed March 23, 1962]

IN THE SUPREME COURT OF THE STATE OF IDAHO

Boise, January Term, 1962

No. 9040

WILSON P. LOCKRIDGE, *Plaintiff-Appellant*,

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY  
AND MOTOR COACH EMPLOYEES OF AMERICA, an Inter-  
national Labor Union; and NORTHWEST DIVISION 1055 OF  
THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a  
Regional Division of the International Union,  
*Defendants-Respondents.*

Appeal from the District Court of the Third Judicial  
District, Ada County. Honorable Merlin S. Young, District  
Judge.

Action for damages for wrongful suspension from mem-  
bership in the defendant union. Plaintiff appeals from  
judgment of dismissal. *Reversed* and cause remanded.

Anderson, Kaufman and Anderson, Boise, for appellant.

Bailey, Lezak, Swink & Gates, Portland, Oregon;

Bernard Cushman, Washington, D. C.; and

McClenahan & Greenfield, Boise; for respondents.

TAYLOR, J.

This action was brought by plaintiff (appellant) to  
recover judgment for compensatory and punitive damages  
against defendant (respondent) labor union for wrongful

suspension of plaintiff's membership. Plaintiff alleges that he was a member of the union from May, 1943, to about November 2, 1959, during which time he was employed by Greyhound Corporation as a bus driver; that his suspension from membership was based upon the contention that plaintiff was in arrears in the payment of his dues, contrary to the constitution and laws of the union; that the union notified the Greyhound Corporation that plaintiff was no longer a member and requested the corporation to discharge him which the corporation did on or about November 2, 1959, pursuant to the request and its contract with the union; and that suspension from membership was not in accord with the constitution and laws of the union, and was wrongful and without lawful basis. The complaint contains two counts in tort and one for breach of contract.

Upon motion of the defendant, the action was dismissed by the district court upon the sole ground that the complaint charged an unfair labor practice, within the exclusive jurisdiction of the National Labor Relations Board, and that the district court had no jurisdiction of the subject matter.

Plaintiff prosecutes this appeal from the judgment of dismissal.

Unincorporated associations, including labor unions, are recognized as legal entities under the laws of this state. I. C. §§ 44-701, 18-5201, 72-1010, 63-3002, 30-101(14).

The constitution and bylaws of the defendant union and the granting and acceptance of membership, constituted a contract between the plaintiff and defendant. 7 C.J.S., Associations, § 11b.

The question presented is whether the cause is one preempted by the Labor Management Relations Act of 1947. Section 7 of the act (U.S.C.A., Title 29, § 157) declares the right of employees to organize and engage in collective bargaining. Section 8 (U.S.C.A., Title 29, § 158) defines

unfair labor practices on the part of both employer and employee. This section in part provides:

“(b) It shall be an unfair labor practice for a labor organization or its agents—

“(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;”

The opinion in *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L.ed 2d 1018, 78 S. Ct. 923, was rendered in an action brought in the Superior Court of California by an expelled union member, for reinstatement and damages. The California court gave judgment for the relief sought. The U.S. Supreme Court noted that to cause an employer to discriminate against an employee on some ground other than denial or termination of membership for failure to pay dues, might constitute an unfair labor practice, under § 8(b)(2). With respect to the relationship between the union and the member, the court said:

“\* \* \* But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power



has been expressly denied. The proviso to § 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . . ' 61 Stat. 141, 29 USC § 158(b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Constr. Workers v. Laburnum Constr. Corp.*, 347 US 656, 98 L ed 1025, 74 S Ct 833.

"Although petitioners do not claim that the state court lacked jurisdiction to order respondent's reinstatement, they do contend that it was without power to fill out this remedy by an award of damages for loss of wages and suffering resulting from the breach of contract. No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board

does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A.A.A.I.W. v. Russell*, 356 US 634, 2 L ed 2d 1030, 78 S Ct 932." *International Asso. Machinists v. Gonzales*, 356 U.S. 617, 2 L ed 2d 1018, at 1021 and 1022, 78 S.Ct. 923.

Defendant cites *Garner v. Teamsters C. & H. Union*, 346 U.S. 485, 98 L ed 228, 74 S.Ct. 161. Distinguishing that case, the court, in *United Constr. W. v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L ed 1025, at 1031, 74 S.Ct. 833, said:

"\* \* \* In the *Garner Case*, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

Defendant also relies upon *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L ed 2d 775, 79 S.Ct. 773. It is contended that the *Garmon* case reaffirms the *Garner* case and modifies and supersedes the *Gonzales* decision as to preemption. The Court split 5-4 as to the applicable ground for the preemption affirmed in the *Garmon* case. The majority opinion was written by Justice Frankfurter, also the author of the opinion in the *Gonzales* case.

In the *Garmon* case the unions sought an agreement by the employer that the latter would retain in his employ only union members and those who applied for membership

within thirty days. Upon refusal, the unions began peaceful picketing, claiming their purpose was to educate and persuade the workers. The employer obtained a judgment in the Superior Court of California for damages and enjoining the picketing on the ground that its purpose was to force the employer to execute the requested contract, contrary to California law. The California Supreme Court affirmed, noting that, since the National Labor Relations Board had refused to take jurisdiction of the controversy, the state courts had power over the dispute.

On the first appeal, the United States Supreme Court ruled that the refusal of the National Labor Relations Board to assert jurisdiction did not leave the state free to act, and remanded the cause for determination by the California court as to whether California law would support the judgment for damages. The California court vacated the injunction and affirmed the damage judgment.

On the second appeal (*supra*) the court said:

“When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *Ibid*.

“To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. • • • •

“• • • In the absence of the Board’s clear determination that an activity is neither protected nor

prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. \* \* \* \*

"In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed 775, at 783 and 784, 79 S.Ct. 773.

Thus, the Supreme Court reaches the conclusion that the Congress has delegated to the National Labor Relations Board the legislative function of determining national policy, even though the act itself purports to spell out such policy (U.S.C.A., Title 29, §§ 141, 151). And the court abdicates, in favor of the board, the judicial function of determining legislative intent. Being an agency also of the executive branch of the government, the board is thus clothed with complete power—to make, to interpret, and to enforce the law. The citizens of the states must be content with what relief the board chooses to afford. Or, if the board refuses to act in any arguable area, citizens of the states must suffer torts and violations of contract rights without relief. Anent the effect of this decision on state jurisdiction, the four justices concurring in the result said:

"The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an

unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in *Russell*, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed 775, at 787 and 788, 79 S.Ct. 773.

Referring to the *Gonzales* case, Justice Frankfurter in the second *Garmon* case said:

"\* \* \* However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Asso. of Machinists v. Gonzales*, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed 2d 775, at 782, 79 S. Ct. 773.

Thus, even though the "penumbral area" may be broadened by the *Garmon* decision, the rule of the *Gonzales* case, applicable here, has not been supplanted.

In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs "neither protected nor prohibited" nor "preempted" by federal law, or, more appropriately, by the National Labor Relations Board.

*Morse v. Local Union No. 1058 Carpenters, etc.*, 78 Idaho 405, 304 P.2d 1097, is not applicable here. In that case

Morse, a member, brought action against the union for damages arising out of loss of employment due to refusal of the union to permit him to transfer from one local to another. The resulting discrimination did not result from a failure to pay dues. Moreover, the opinion in the Morse case was handed down more than a year before the decision of the Gonzales case, hence we did not have the benefit of that, and other later opinions of the federal courts in arriving at the conclusion reached in the Morse case.

We hold that under the rule of the Gonzales case the district court had jurisdiction of this controversy, and that the Garmon case is not in point. *Gainey v. Local 71 International Bro. of Teamsters (N.C.)*, 113 S.E.2d 594; *Barlow v. Roche (D.C.)*, 161 A.2d 58; *Dempsey v. Great Atlantic and Pacific Tea Co.*, 197 N.Y.S.2d 744; *Perko v. Local No. 207 of Int. Ass'n of Bridge, etc., Wkrs., (Ohio)*, 167 N.E.2d 903; *United Association of Journeymen, etc. v. Borden (Tex.)*, 328 S.W.2d 739; *Green v. Folks*, 208 N.Y.S. 2d 559. See also: *Selles v. Local 174, etc. (Wash.)*, 314 P.2d 456, Cert. denied, 356 U.S. 975, 2 L.ed 2d 1149, 78 S.Ct. 1134, rehearing denied, 358 U.S. 860, 3 L.ed 2d 95, 79 S.Ct. 14; *Kuzma v. Millinery Workers Union Local No. 24 (N.J.)*, 99 A.2d 833; *McDermott v. Jamula (Mass.)*, 154 N.E.2d 595; *Cooperative Refinery Asso. v. Williams (Kan.)*, 345 P.2d 709.

The judgment of dismissal is reversed and the cause is remanded for further proceedings.

Costs to appellant.

SMITH, C.J., and KNUDSON, McQUADE and McFADDEN, JJ.,  
concur.

**APPENDIX D****District Court Memorandum Decision**

[Filed December 21, 1962]

• • • • •

This matter is before the Court for its ruling upon paragraphs I, II and IV of plaintiff's motion to strike directed to the answer of defendants filed herein.

The Court's ruling on these paragraphs was reserved after oral arguments, subject to the filing of briefs of the parties. All briefs have now been filed with the Court.

After an examination of the record, including exhibits attached to the pleadings and exhibits and documents produced by interrogatories and discovery, I have concluded that plaintiff's motion should be granted as to paragraphs I, II and IV.

My reasons for so deciding, briefly stated, are these:

With regard to the conclusions of defendants in paragraph VI of defendants' first affirmative defense, I have concluded that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends. The Union's security clause in the contract (Exh. B) merely requires that employees covered by the contract shall remain members of the Union as a condition precedent to continued employment. It is clear that under the terms of the constitution, Section 91, plaintiff was still a member of the Union at the time of the occurrences in question, although not in good financial standing. The agreement (Exh. B) does not authorize defendants to cause plaintiff's discharge for such a condition. I thus conclude this purported defense is sham and should be eliminated at this time so it will not confuse the issues at time of trial.



With regard to paragraph IV seeking to strike defendants' second affirmative answer and defense, I conclude that it is also completely sham and irrelevant because it is dealing solely with employee grievances with their employing company, and by its terms it is obvious that it has nothing to do with internal administrative procedures within the Union insofar as it relates to disputes between the Union and its members.

Counsel for plaintiff is requested to prepare a formal order in accordance with this memorandum opinion.

Dated this 21st day of December, 1962.

/s/ MERLIN S. YOUNG  
District Judge.

#### APPENDIX E

##### District Court Memorandum Decision

[Filed June 21, 1966]

. . . . .

This matter has been in court since September of 1960. In his original complaint plaintiff sued the defendant unions and Greyhound Corporation. Thereafter plaintiff voluntarily dismissed Greyhound Corporation. This Court thereafter granted the unions' motion to dismiss plaintiff's complaint on the ground that the courts of the State of Idaho lacked jurisdiction because the matter in controversy "arguably" involved unfair labor practices under Sections 7 and 8 of the N.L.R.A., and thus was "pre-empted." In making this ruling, this Court relied upon *San Diego Buildings Trade Council v. Garmon*, 359 U.S. 236, 3 Law Ed. 2d 775, 75 Sup. Ct. 772, and *Wax v. International Mailers Union*, 161 A 2d 603 (Pa.). At this same time I denied defendants' motions to dismiss plaintiff's complaint upon the following grounds: That the complaint failed to state a claim; that defendants were not properly served



with process; that the Council of Western Greyhound Amalgamated Divisions is an indispensable party to the action; that there has been a misjoinder of causes of action. These rulings stand.

The above order of dismissal of this Court was appealed to the Supreme Court of Idaho and reversed by unanimous decision in March of 1962 (*Lockridge v. Amalgamated Association, et al.*, 84 Idaho 201; 365 Pac. 2d 1006). In doing so, the Idaho Supreme Court said: "We hold that under the rule of the Gonzales case the District Court had jurisdiction of the controversy and that the Garmon case is not in point." The Court was referring to *Association of Machinists v. Gonzales*, 356 U.S. 617, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923.

Following the Idaho Supreme Court decision and after much delay as the result of numerous conferences and motions, the matter became at issue, and was tried before this Court in October of 1965.

There is very little dispute over the facts. In summary, my opinion is that the plaintiff has established by a preponderance of evidence that the defendants through their officers wilfully and intentionally caused a termination of plaintiff's employment with Greyhound Corporation pursuant to the provisions of a collective bargaining agreement with Western Greyhound Lines, which agreement provided that all employees "shall remain members (of Division 1055) as a condition precedent to continued employment," on the ground that plaintiff was not a member of Division 1055 in good financial standing. However, in fact, at the time of termination of his employment, plaintiff was a *member* of Division 1055 under the terms of the Union Constitution, although he was not in good financial standing because he was one month delinquent in payment of his dues.

Following termination of plaintiff's employment, he made some efforts to seek reinstatement in the union through

union procedures. The defendants contend the plaintiff failed to exhaust his internal union remedies, and this alone should be sufficient to bar his action. (87 ALR 2d 1099-1103) While plaintiff could have made a better legal record of his attempts to seek reinstatement through union procedures, I conclude that the facts taken as a whole and the inferences which I believe may legitimately be drawn therefrom indicate that further attempts to follow procedures provided by Section 81 of the Union Constitution would have been futile. The International President Elliott, Charles C. McCaffery, an International Vice President, and E. W. Oliver, a member of the General Executive Board, were aware of and approved of the decision of the Financial Secretary of Division 1055 to ask plaintiff's termination with Greyhound. I am convinced that the true facts are that the defendants' officers were irritated by plaintiff's refusal to go along with a voluntary dues check-off by Greyhound and mistakenly believing that they were technically correct, asked plaintiff's termination under the collective bargaining agreement because he was not in good standing. In doing so, they decided to make an example of plaintiff. They have held to such technical position since, although the collective bargaining agreement by its unambiguous terms only requires that plaintiff remain a *member* of defendant union as a condition of employment, as contrasted to a requirement that the employee be a *member in good standing*. Defendants would bind plaintiff to a claimed mutual understanding between the employer and the defendants, apparently arrived at by ESP that the agreement did not mean what it plainly says. Likewise they ignore the custom and tradition of tolerance by the union of such short term delinquency.

Likewise, I conclude that to pursue grievance procedures against Greyhound Corporation, as provided in the collective bargaining agreement, would be an application of the grievance procedure to a situation which was never

intended to be covered by it. The dispute herein, under the pleadings and theories of the case accepted by the Idaho Supreme Court, lies between defendants and plaintiff, or between the union and its member, and not between an employer and its employee. Defendants urge the rule in the case of *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 Sup. Ct. 614, which requires that an employee pursue grievance procedures before suing in court for contract benefits provided under a collective bargaining agreement. The factual situation here is very different from *Maddox*.

Thus, although I have not spelled out my findings in detail, I find that the allegations of Paragraphs I, II, III, IV, V and VIII of plaintiff's second amended complaint are sustained by a preponderance of the evidence and well state the ultimate facts which have been proved in this case.

In view of the foregoing holding, except for the question of damages, which will be discussed hereafter, the only remaining issue is the legal one of whether under the above stated findings this court or any state court has jurisdiction of the issues involved in this case. Although the pleadings have been amended rather substantially, the pre-emption issue is the same as it was when this matter first went to the Idaho Supreme Court. I think defendants' position on this issue is greatly reinforced by *Plumbers' Union v. Borden*, 373 U.S. 690, 10 L. Ed. 2d 638, 83 Sup. Ct. 1423; *Iron Workers v. Perko*, 373 U.S. 701, 10 L. Ed. 2d 646, 83 Sup. Ct. 1429; and *Day v. Northwest Division 1055, et al.*, 233 Ore. 624, 389 Pac. 2d 42. Plaintiff continues to claim that he is entitled to damages for injury to his employment as distinguished from remedies for loss of union rights; nevertheless, I feel that I have been virtually directed by the Idaho Supreme Court to decide this case on the theories of "Gonzales," and I must consider that decision the law of this case. In *Gonzales*, the plaintiff primarily sought reinstatement in the union so he could work on union con-

struction jobs. Damages were incidental to this relief. The same relief would under the theories of plaintiff in this action afford him the major part of his remedy.

I thus conclude that although plaintiff has never sought such remedy, he is entitled to restoration of his membership in defendant unions upon payment of current dues, and in addition he is entitled to actual damages suffered as a result of loss of membership from the time of its wrongful termination to its restoration.

The record does show that his loss of membership did deprive him of employment with Greyhound and other bus driving jobs. He was not equipped by education or experience to find other employment with a comparable income. Using the earnings of Greyhound driver Francis Carter who took plaintiff's place on the seniority list as compared to plaintiff's earnings as shown by his income tax returns between November 3rd, 1959, to September 15, 1965, I find the plaintiff's actual damages resulting from loss of his driving job with Greyhound have been \$32,678.56. This amount was computed as follows:

<u>Year</u>	<u>Carter</u>	<u>Plaintiff Lockridge</u>
1959	\$ 6,017.57	\$ 5,014.38
1960	6,750.27	489.40
1961	7,410.50	258.00
1962	7,213.63	350.00
1963	8,093.61	2,185.00
1964	8,265.50	5,000.00
1965 (thru Sept. 15)	6,185.74	3,961.50
	<u>\$49,936.84</u>	<u>\$17,258.28</u>

However, I conclude the plaintiff is not entitled to future damages arising from continued loss of employment with Greyhound because "Gonzales" and the theories thereof contemplate that restoration of union membership will afford full relief and allow his reemployment at the same

job. However, I further find that plaintiff is entitled to accruing damages at the rate of \$3,500.00 per year until membership in the union is fully restored. Although plaintiff will theoretically lose seven years of seniority with Greyhound, I have no way of computing the value of said loss. Likewise the monetary value of any retirement and insurance benefits lost during this period has not been established.

I further conclude that plaintiff is not entitled to punitive damages against defendants. I do not find their acts wanton and willful or oppressive to the extent which has been required in the past by Idaho decisions; and, as indicated above, I believe that the union, although it wished to punish the plaintiff for refusing to go along with the check-off, did believe it was technically on sound legal ground in requesting his termination. Likewise, it is my opinion that the plaintiff is partially at fault for his predicament because he did not pursue certain remedies which I think were available to him. He might have sought a restoration of his membership pendente lite through court order, or through N.L.R.B. action. Although counsel for plaintiff obviously feels otherwise, I do not believe that it can be assumed that the N.L.R.B. would have acted unfavorably to plaintiff had he made application to it and had all the facts been fully presented to it. What Day presented has never appeared.

Counsel for plaintiff is requested to prepare findings of fact, conclusions of law and judgment for my signature in accord with this decision. If counsel for defendants wish to object to any findings or conclusions of law, I ask that they follow Rule 52(b) I.R.C.P.

Dated this 21st day of June, 1966.

/s/ MERLIN S. YOUNG  
District Judge.

**APPENDIX F****District Court Memorandum Decision and Orders on Motions  
To Amend Findings of Fact, Conclusions of Law and  
Judgment**

[Filed September 1, 1966]

. . . . .

This matter is before me upon motions to amend findings of fact and conclusions of law filed by both plaintiff and defendants.

By paragraphs I, II, and III plaintiff asks the Court to award greater damages than found in my memorandum decision. The actual damages suffered by plaintiff are basically speculative in a case of this kind and at best can only be an estimate. Plaintiff dropped his earlier claims for punitive damages in his last amended complaint, a fact which I overlooked in my memorandum decision, but I presume it was done to avoid any inference that his claim is based in tort for wrongful interference with his employment. It is difficult for me to see how claims for embarrassment, discomfort, and mental distress could be considered to have been within the contemplation of the parties at the time plaintiff entered into his union membership contract. In any event, I did consider most of the elements suggested by plaintiff and did arrive at the conclusion that under all of the circumstances the difference between plaintiff's actual income and his substitute offered a fair and realistic measure of damages. Therefore, plaintiff's requested amendments I, II, III and IV are denied.

By request V plaintiff asks this Court to direct defendants to restore plaintiff to membership with full restoration of seniority in union membership from 1943. In his motion plaintiff says, "Even the N.L.R.B. awards full restoration of seniority where restoration of employment is ordered." From this, I gather that plaintiff believes that by this decision I am ordering plaintiff restored to his employment with his former employer Greyhound. If it

be so interpreted, I believe this Court would then clearly be in excess of its jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the "Borden" and "Perko" decisions. I do not have any jurisdiction over his employer-employee relationship in this action. It is my opinion that at most I can restore to him his union membership as of the date of its wrongful termination. In this I am attempting to follow "Gonzales" as I understand it. I therefore will deny request No. V.

By paragraph VI of his motion to amend, plaintiff seeks to strike the whole provision providing for future annual payments upon refusal to restore plaintiff to membership and to substitute a fixed sum based upon plaintiff's life expectancy and the differences in pay and retirement he might have received from Greyhound as compared to his present employer. As I indicated at the oral argument, I have concluded that the future penalty provision was an error and not authorized under the theory of "Gonzales" or any other theory of law. I will therefore deny plaintiff's requested amendment VI, but will strike Paragraph XIII from the findings of fact, the parts of conclusions of law and judgment referring to such future damages.

Plaintiff's Request VII is granted.

Considering defendants' motion to amend, I conclude that overall the record does support a finding that the union had in the past been tolerant of late dues payment and that the findings are not too far out of line in that regard; and the defendants' international officers knew of and condoned the actions of Bankhead. Therefore Paragraphs I and II are denied. I will grant Paragraph III to the extent that everything after the word "Court" in Line 5 of Conclusion I will be stricken. All other requests of defendants will be denied except that "all customs and" in Line 7 of Paragraph III of the conclusions of law will



be changed to "past." Paragraphs IV, V, and VI of defendants' motion are denied.

I have made the above amendments by interlineation on the original document. Copies of the portions which have been altered are attached for counsels' information.

IT IS SO ORDERED.

Dated this 1st day of September, 1966.

/s/ MERLIN S. YOUNG.  
District Judge.

### APPENDIX G

#### District Court Findings of Fact. Conclusions of Law and Judgment (as Amended)

[Filed September 1, 1966]

• • • • •

The above entitled cause came on regularly to be heard before the court sitting without a jury on the 11th day of October, 1965, plaintiff appearing in person and by Samuel Kaufman of the firm of Anderson, Kaufman and Anderson, his attorneys, and defendants appearing by counsel, Isaac N. Groner, Paul T. Bailey and George A. Greenfield. Whereupon, following submission of oral and documentary evidence, counsel presented oral argument and written briefs and the court being now fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, as follows:

#### FINDINGS OF FACT

##### I

That defendant Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as the International Association, is an organized labor association or union having as members



workmen connected in some manner with the operation of trolleys, busses and coaches, including those skilled and trained in driving the same and particularly, as concerns this case, busses owned and operated within the State of Idaho by Western Greyhound Lines, a division of Greyhound Corporation. That said International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association who in turn are grouped within various regional divisions.

## II

That Northwest Division 1055 of the International Association, hereinafter referred to as Division 1055, is one of the regional divisions of the International Association and includes as members thereof members of the International Association who live and work within the regional boundaries of Division 1055 which includes portions of the State of Idaho. That said Division 1055, and the officers thereof, are members of the International Association, subject to ultimate authority and control of the International Association within the framework of the constitution and general laws of the Association (Exhibit 34) to which they are all subject.

## III

That the International Association, through its International officers and through officers and agents of Division 1055, and Division 1055 itself, through its officers and agents, have each conducted and are conducting business within the State of Idaho. That at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of the International Association, Division 1055 and the members thereof. That a number of members of the International Association and Division 1055 thereof live in and are basically employed within the State of Idaho

and the International Association and Division 1055 are the exclusive representatives of said members for the purposes of collective bargaining relative to conditions of employment and for negotiation and execution of contracts with employers pertaining to such matters, some of which employers are within the State of Idaho, and officers and agents of both the International Association and Division 1055 come into the State of Idaho to conduct internal union affairs and to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of the members of said International Association and Division 1055.

#### IV

That plaintiff is a man of the approximate age (at time of trial) of 51 years, married and with two children, both of whom, at time of trial had reached the age of majority. Plaintiff did not complete high school and has no educational or experience background to qualify him to do much else than drive a bus or other similar motorized vehicle and has a physical disability of the back resulting from an accident driving a bus prior to 1959, which disability curtails plaintiff's activities in other fields involving physical labor.

#### V

That since on or about May 16, 1943, and to and including on or about November 2, 1959, plaintiff was a member of the International Association within Division 1055 thereof and has continuously been employed as a bus driver for Western Greyhound Lines, or its predecessors. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver and under the laws of the union and the employment contract, Exhibit 35, such seniority commensurate rights and benefits in working privileges and compensation to be received therefrom. Exhibit 35 comprises actually two contracts, Contracts B and C, but the contract covering plaintiff's employment and which is

pertinent in this case is Contract B, being the approximate first half or the white pages of Exhibit 35.

## VI

That on or about November 2, 1959, C. A. Bankhead, treasurer and financial secretary of Division 1055, acting in his official capacity and within the scope of his activities as treasurer and financial secretary and, under the facts presented and all reasonable inferences to be drawn therefrom, acting for the International Association and pursuant to knowledge and approval of, if not direct advice and orders from, the International Association President, and International Vice-President, and a member of the General Executive Board of the International Association, suspended plaintiff from membership in the union on the sole grounds that plaintiff was in arrears in payment of dues contrary to the requirements of the constitution and general laws of the union (Exhibit 34) and by letter dated November 2, 1959 (Exhibit 4) notified the employer, Western Greyhound Lines, that plaintiff was no longer a member in good standing in the union and requested said employer to remove him from employment. That immediately following receipt of such notice from C. A. Bankhead, the employer discharged plaintiff from employment (Exhibits 8 and 9). One Elmer Day was likewise suspended under identical circumstances.

## VII

That the contract agreement (Exhibit 35), and particularly paragraph No. 3a of Section I, on page 5, requires that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to continue employment. Section 91 of the Constitution of the International Association (Exhibit 34) provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of

the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and further, where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership in the association, meaning the International Association. Said Section 91 further provides that where agreement with employing companies provides that members must be in *continuous good financial standing*, the members in arrears one month *may* be suspended from membership and removed from employment. Section 93 of Exhibit 34 provides that where members are in arrears past the last day of the second month they shall, at the last meeting of each month, be reported by the financial secretary as having suspended themselves from membership except where members are suspended in compliance with the terms of agreements, the members *may* be so reported and suspended after the period of one month. That at the time of their suspension from membership in the International Association on or about November 2, 1959, plaintiff and said Day were in arrears in payment of their dues only since the 1st day of October, 1959. Additionally, it has over the years been customary within Division 1055 for members to be in arrears in their dues without being suspended, even though said arrearages exceeded 60 days, it being the custom of Division 1055 in the past, and almost without exception, to remove the delinquent member only from service rather than suspend him from union membership and immediately upon payment of his delinquent dues, put him back in service without loss of seniority. Additionally, the financial secretary of Division 1055 did not report at the last meeting prior to suspension, that plaintiff or Day were in arrears in dues.

### VIII

That at the time plaintiff's wife was notified of plaintiff's suspension from union membership in early November

1959 (plaintiff was elk hunting during a vacation period) plaintiff's wife, by letter dated November 10, 1959, submitted to C. A. Bankhead, financial secretary of the Division 1055 a check to cover plaintiff's dues for both October and November but the said C. A. Bankhead refused to accept the same and the check was returned (Exhibit 5).

## IX

Following his return to Boise in mid November 1959, and immediately upon learning of his suspension from union membership with resulting termination of his employment, plaintiff contacted C. A. Bankhead requesting advice as to what he could do to obtain reinstatement of his union membership and on several occasions submitted checks for his arrearages and penalties all of which were refused. On one occasion during November 1959, another driver and fellow member tendered dues for plaintiff to Bankhead who was told not to accept the same by International Vice-President Charles McCaffery. While the said Bankhead suggested to plaintiff that he write to the International President, which plaintiff delayed in doing until January 8, 1960 (Exhibit 11) said Bankhead himself wrote to the International President (Exhibit 6) requesting that the International President and/or the General Executive Board waive the provisions of Section 94 of the Constitution and reinstate plaintiff. This was not done and subsequently there evolved correspondence between Plaintiff and the International President and others (Exhibits 10, 11, 12, 13, 14, 15, 16, 17) as well as oral conversations between plaintiff and other union members on his behalf and officers of both Division 1055 and International Vice-President McCaffery.

## X

That at the time of his suspension from union membership, plaintiff was 46 years of age. In 1959 he earned \$5,014.38 from his employment although he did not work

the full year. Upon plaintiff's suspension from union membership, the next driver in seniority, one Francis Carter, moved up in the seniority list and in effect, took plaintiff's place on that list. The comparable earnings of said Carter and plaintiff for the period 1959 through September 15, 1965, are as follows:

YEAR	CARTER	PLAINTIFF
1959	\$ 6,017.57	\$ 5,014.38
1960	6,750.27	489.40
1961	7,410.50	258.00
1962	7,213.63	350.00
1963	8,093.61	2,185.00
1964	8,265.59	5,000.00
1965 (Through Sept. 15)	6,185.74	3,961.50
TOTAL	\$49,936.84	\$17,258.28

That during the past several years the said Carter has, by reason of his seniority, been able to bid and hold a regular run. That in addition thereto, had he chosen to do so, he could have worked what is known as the extra board, which is the customary practice of other drivers, but which Carter chose not to do for personal reasons. The evidence discloses that for the years 1963 and 1964, the said Carter working the extra board, could have earned at least \$1200.00 a year more than he chose to and commencing 1965, any driver with such seniority could earn at least \$10,000.00 per year.

## XI

That following his suspension from union membership in November 1959, plaintiff was without steady employment until after mid 1963 when he obtained employment with the State of Idaho Highway Department which necessitated his moving from the Boise Valley to Lowman, Idaho, where he has resided since. Until his employment with the State of Idaho Highway Department in 1963, plaintiff

made many efforts to seek employment within the limits of his educational, experience and physical abilities and his lack of earnings during that period are not due to failure of effort on his part.

## XII

Plaintiff's present wages with the State of Idaho Highway Department are approximately \$5,300.00 per year. That in addition to a difference in earnings of approximately \$4,700.00 per year, various insurance and burial benefits from employment as a bus driver considerably exceed that which are available to plaintiff as an employee of the State of Idaho Highway Department although these cannot be translated into dollars and cents. In addition, under retirement plans with Western Greyhound Lines, plaintiff would be able to retire between ages 60 and 65 with a retirement income of at least \$300.00 per month and his present retirement benefits under the State of Idaho Public Employee Retirement law entitles him to approximately \$50.00 per month retirement. Plaintiff's life expectancy at time of trial is approximately 23 years.

## XIII

That as a result of his suspension from union membership plaintiff has suffered embarrassment, discomfort, mental anguish and humiliation and additionally a financial loss in earnings to September 15, 1965 in the sum of \$32,678.56.

## CONCLUSIONS OF LAW

### I

That each of the defendants, International Association and Division 1055 are the proper parties defendant in this action, have done and are doing business within the State of Idaho, were duly and properly served with summons and complaint herein and are properly within the jurisdiction of this court.



## II

That the Constitution and general laws of the International Association (Exhibit 34) as well as the contract agreement (Exhibit 35) are, with respect to plaintiff's requirement for paying dues and his suspension from membership in the union for failure to pay dues, clear and unambiguous in their terms. That the contract, Exhibit 35, requires only that plaintiff remain a member of the association and Section 91 of the Constitution therefore does not provide for suspension from union membership until plaintiff be arrears in his dues past the last day of the second month. That on November 2, 1959, plaintiff was in arrears in his dues only two days past the first month and his suspension from union membership was wrongful.

## III

That even where employment contracts provide that the union member remain in good financial standing, as opposed to merely being a member of the union as is the requirement of Exhibit 35, suspension from union membership after 30 days delinquency is not mandatory but discretionary and any suspension of a union member for dues delinquency after 30 days violates past practice of Division 1055. That in suspending plaintiff from union membership officers of Division 1055 did not conform to the procedural requirements of the Constitution nor to the customs and practices of Division 1055 and at all times acted with knowledge and consent of, if not direct orders from, officers of the International Association.

## IV

That while plaintiff might have made a better legal record of his attempts to seek reinstatement through union procedures, particularly Section 94 of the Constitution, the facts, taken as a whole, together with all reasonable inference which may be legitimately drawn therefrom, indi-

cate that any further attempts on plaintiff's part to seek reinstatement or to follow other procedures such as provided in Sections 79-81 of the Constitution, the proper application of which in this instance is doubtful, would have been useless and futile gestures.

## V

The grievance procedures set forth under Section 1, paragraph 3 and following of Exhibit 35 are of no proper application in this instance and are intended to cover grievances existing between an employee and employer and not internal problems existing between the union member and the union such as in this case.

## VI

That the Constitution and By-laws of the International Union constitute a contract between the union and the members thereof and in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and contrary to all custom within Division 1055, defendants, whose officers and agents acted in concert, violated said contract.

## VII

That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and resulted in a wrongful interference with plaintiff's employment, occupation and livelihood and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish.

## VIII

While plaintiff did not seek such remedy, he is entitled to all relief warranted by the evidence and the court concludes that plaintiff should be granted judgment for damages of \$32,678.56 for loss of earnings to September 15, 1965, and for full restoration of union membership upon payment of current dues.

## JUDGMENT

WHEREUPON, upon the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover judgment against defendants, and each of them, for the sum of \$32,678.56, together with interest thereon at the rate of 6% per annum until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants restore plaintiff to membership in the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, an International Labor Union and Northwest Division 1055 thereof upon his tender of current dues.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT THE plaintiff do have and recover his costs incurred herein in the sum of \$365.55.

Dated this 1st day of August, 1966.

/s/ MERLIN S. YOUNG.  
*District Judge.*

Judgment amended by the Court on Sept. 1, 1966, as shown by additions and deletions shown thereon [deleted from this printing].

/s/ MERLIN S. YOUNG.  
*District Judge.*

## APPENDIX H

## Idaho Supreme Court Decision

[Filed October 15, 1969]

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9959

Boise, November Term, 1968

\* \* \* \* \*

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. The Honorable Merlin S. Young, District Judge.

Action by a former member of a labor union against the union for reinstatement to membership and for damages resulting from an improper discharge from membership. Judgment *affirmed, as modified, and remanded.*

McClenahan & Greenfield, Boise, Earle W. Putnam, Cole and Groner, Washington, D. C., Bailey, Swink, Haas, Seagraves and Lansing, Portland, Oregon, for appellant.

Anderson, Kaufman, Anderson & Ringert, Boise, for respondent.

SPEAR, J.

This is the second appearance of this cause before this court. See *Lockridge v. Amalgamated Ass'n of St. El. Ry. & M.C. Emp.*, 84 Idaho 201, 369 P 2d 1006 (1962). The issue presented is the same: "Does the National Labor Relations Act pre-empt state court jurisdiction over the question of whether a union member has been improperly expelled from membership in the union for alleged non-payment of dues in violation of the contractual relationship between the two?" Appellant union urges that seven decisions subsequent to the previous *Lockridge* decision require reversal of that decision. Appellant points particularly to *Plumber's Union v. Borden*, 373 U.S. 690, 10 L.Ed. 2d 638, 83 S.Ct. 1423 (1963); *Iron Workers v. Perko*, 373 U.S. 701, 10 L.Ed. 2d 646, 83 S.Ct. 1429 (1963); *Cox's*

Food Center, Inc. v. Retail Clerks U. Loc. No. 1653, 91 Idaho 274, 420 P.2d 645 (1966); and Day v. Northwest Division 1055, et al, 238 Ore. 624, 389 P.2d 42 (1964). It is the opinion of this court that the issues in this case are identical to those presented in International Assn. of Machinists v. Gonzales, 356 U.S. 617, 2 L.Ed. 2d 1018, 78 S.Ct. 923 (1958), and as such require an affirmance of the decision below. However, since the decisions in *Borden* and *Perko* have to some extent impaired the vitality of *Gonzales*, we feel that further elaboration of the facts and law relied upon must be made and the scope of *Lockridge* limited as set forth herein.

Wilson P. Lockridge was born October 15, 1915. He had a limited education, completing his formal education at the conclusion of the 8th grade. Between the ages of approximately fourteen and twenty-two, he was employed on his father's farm. Thereafter, from 1937 until May 1943 he drove truck for a creamery. In May of 1943 respondent Lockridge went to work for Union Pacific Stages, driving a bus. At that time he also became a member of the appellant union. In 1945 Lockridge began working for Greyhound Corporation or a subsidiary thereof which acquired Union Pacific Stages. Thereafter Lockridge was continually a member of the union and employed by Greyhound until November 2, 1959. On November 11 or 12, 1959, after returning from a hunting trip, Lockridge was informed that his membership in the union had been terminated and a request had been made by the union to representatives of Greyhound that his employment be terminated. The contents of this letter, dated November 2, 1959, is set forth as follows:

"Mr. W. H. Egger, Regional Manager  
Eighth and Stewart Streets  
Seattle, Washington

Dear Mr. Egger:

Mr. Elmer J. Day and Mr. W. P. Lockridge are not in good standing in our Union. They have suspended

themselves from membership so in compliance with Section 3 of Contract B, I am asking that you remove them from employment.

Sincerely,

/s/ C. A. BANKHEAD  
C. A. Bankhead  
*Financial Secretary*

At that time a contract existed between appellant and Greyhound which contained the following pertinent provision referred to in the Bankhead letter:

"3. Membership in and Recognition of the Association, Grievances and Arbitration: (a) All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and shall remain members as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY."

The pertinent part of the Union's Constitution and General Laws, provided as follows:

"DUES, SUSPENSIONS AND REINSTATEMENTS

"Sec. 91. All dues, \* \* \* of the members of this Association are due and payable on the first day of each month for that month, \* \* \* They must be paid by the fifteenth of the month in order to continue the member in good standing. \* \* \* A member in arrears for his dues, \* \* \* after the fifteenth day of the month is not in good standing \* \* \* and where a member allows his arrearage in dues, fines and assessments to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage for

dues, fines and assessments to run *over the last day of the second month* without payment, he does thereby suspend himself from membership in this Association, . . . . Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement." (emphasis added)

It is obvious from a reading of the materials quoted above, that Lockridge was *not* subject to suspension or dismissal from the union for non-payment of October dues on November 2, 1959. It is equally obvious that Mr. Bankhead confused Section 3 of Contract B, the only one applicable to Lockridge with Section 3 of the Contract C, which provided for suspension of members *not in good standing*.<sup>1</sup>

At this point it is interesting to note the results of the divergent remedies which were sought by the two suspended members. Day immediately filed an unfair labor practice charge with the N.L.R.B. Seattle Regional Office. Lockridge began petitioning the union for redress of his griev-

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<sup>1</sup> "3. Membership and Recognition of the Association, Grievances and Arbitration:

(a) Any employee who now is a member in good standing or who, after May 15, 1946 (after May 1, 1951, for General Acct. Dept. employees), becomes or is reinstated as a member of the Association, shall, as a condition of continued employment, maintain such membership in good standing. Any employee first hired after May 15, 1946 (after May 1, 1951, for General Acct. Dept. employees), shall, as a condition of continued employment, become on or before thirty days from the date of hiring a member of the Association and thereafter maintain such membership in good standing."



ances. Day's petition was rejected by the regional director of the N.L.R.B.<sup>2</sup>

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<sup>2</sup> "Mr. Elmer J. Day  
Route 3, Box 90  
Sherwood, Oregon

Re: Western Greyhound Lines  
36-CA-986  
Street, Elec. Railway, and Motor  
Coach Employees, Div. 1055  
36-CB-238

Dear Mr. Day:

The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigation, it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D.C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D.C. by the close of business on December 28, 1959. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours,

THOMAS P. GRAHAM, JR.  
Regional Director"

Lockridge's appeal was rejected by the union.<sup>3</sup>

The basis for the Regional Director's decision is not too clear, but it is obvious that the union had terminated Lockridge's membership. On the other hand, Greyhound, by

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<sup>3</sup> "Dear Mr. Lockridge:

This will acknowledge receipt of your letter of January 18, 1960, requesting that I, or the General Executive Board, waive the provisions of Section 94 of the Constitution and General Laws of this organization in order that you might be reinstated to membership. Please be advised that, in my capacity as International President, I have no power to waive the provisions of the Constitution and General Laws.

Perhaps you have in mind Section 170A of the Constitution and General Laws which now provides as follows:

'The I.P., I.S.-T., Vice-Presidents and G.E.B. shall constitute a committee and shall have power, unless prohibited by the Labor-Management Reporting and Disclosure Act of 1959, to waive any clause of this Constitution by a three-fourths vote of this Committee, such action being binding upon the A.A. of S.E.R. and M.C.E. of A. only until the convening of the next Convention of the Association.'

The General Executive Board has ruled that Section 170A is intended to be used only in emergency situations and then only at the instance of the officers of the International Union or the General Executive Board when such situations threaten to impair the administration of the affairs of the Association or its Local Divisions. The Board has ruled that Section 170A was not intended to be available to an individual member or former member or to be a substitute for the appeal procedures of our Constitution and General Laws. Accordingly, the General Executive Board declined to process your request for waiver.

I wish to add, however, that even if I had the power to waive Section 94, I would not, on the basis of the information before me, be inclined to support your request. As I understand the facts, you were validly discharged for non-payment of dues on November 3, 1959, pursuant to the provisions of Section 3 of Contract B between Western Greyhound Lines and the Council of Western Greyhound Amalgamated Divisions and the various Amalgamated Divisions, including Division 1055. Your discharge had been requested by Division 1055, pursuant to the contract, for

letter of February 2, 1960, obviously felt obligated to withhold employment from Lockridge until his membership status in the union was restored. Thus Lockridge (and Day for that matter) could not be employed by Greyhound until restored to membership. At this point it must have been clear to both men that they would not obtain relief from either the union, the employer or the N.L.R.B. Therefore, they each turned to their respective state courts. After the jury had returned a verdict in Day's favor, the union appealed to the Oregon Supreme Court, which reversed the judgment in *Day v. Northwest Division 1055, et al*, 389 P.2d 42 (Ore. 1964), stating that the subject-matter had been pre-empted and that *Borden* and *Perko* were controlling. The United States Supreme Court denied review.

Appellant's position may be summarized by three contentions: (1) Congress has pre-empted all state court jurisdiction over union-member relationships since it has comprehensively regulated the field. (2) There was no unfair labor practice because Lockridge's dismissal from the union and consequently from employment was in accord with union rules and the contract and therefore was protected by the proviso to sec. 8(b)(1)(A) and sec. 8

non-payment of dues within the time required under the Constitution and General Laws. You have offered no reasons and furnished no evidence as to why the Constitution and General Laws should be waived. Indeed, my investigation discloses that you were put on notice by the Division's letter of October 22, 1959 of the importance of paying your dues within the period required under the Constitution and General Laws. Nevertheless you thereafter failed to pay your dues as required by our laws.

I might add that in my opinion, the privilege of reinstatement under Section 94 is not available to a member discharged under Section 91 under a union security contractual provision. It is, however, unnecessary to rule on this point here.

Very truly yours,

/s/ JOHN M. ELLIOTT

John M. Elliott

International President"

(b)(2) of the National Labor Relations Act<sup>4</sup> and at the very least there would be no cause of action. (3) If this was not a proper dismissal in accordance with union rules and the contract, then the dismissal was in violation of 8(b)(1)(A) generally and 8(b)(2) in particular and therefore an unfair labor practice. In other words, a union cannot, first of all and in general, impair the right of an employee to either join or refrain from joining a union, in violation of 8(b)(1)(A) and, second of all, in particular, a union cannot cause the employer to discriminate against an employee by having the former terminate the latter's employment for some reason other than non-payment of regular dues, in violation of 8(b)(2). The union then argues that since the trial court found Lockridge *had* paid his dues on time the union necessarily committed an unfair labor practice. Therefore, since *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959) held that conduct which was arguably an unfair labor practice was pre-empted, the union's conduct in this case being certainly an unfair labor practice must be pre-empted. We shall deal with each of these contentions in order.

(1) There is total pre-emption of the field.

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<sup>4</sup>“(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;” (29 U.S.C. § 158(b)(1); 29 U.S.C. 158(b)(2)).

This proposition is not true. Appellant's argument on this point sweeps with too wide a broom. We find under part (3) hereinafter that this court has jurisdiction over the particular subject matter of this particular suit, and it necessarily follows that the broad proposition of total pre-emption, which appellant argues here, is not valid.

(2) This was a proper dismissal and therefore protected activity.

This argument, too, can be summarily dismissed because appellant has conceded on this appeal that it did not dismiss respondent in accordance with either union rules or the contract with Greyhound. Furthermore, appellant did not seriously contend otherwise in the court below since its arguments were almost exclusively directed toward the court's jurisdiction with respect to service of process and subject-matter jurisdiction. Finally, it is readily apparent, on the basis of those portions of the labor contract and the union constitution hereinbefore cited, that this is a position which is untenable. The trial court so found<sup>5</sup> and no appeal was taken therefrom.

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<sup>5</sup> (Finding of Fact VII). "That the contract agreement (Exhibit 35), \* \* \* requires that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to continued employment. Section 91 of the Constitution of the International Association (Exhibit 34) provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and further, *where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership* in the association, meaning the International Association. \* \* \* That at the time of their suspension from membership in the International Association on or about November 2, 1959, plaintiff and said Day were in arrears in payment of their dues only since the 1st day of October, 1959. \* \* \*"

- (3) This was an unfair labor practice and therefore pre-empted.

This brings us, then, to appellant's most serious argument. At the outset, we concede much of what appellant argues. Appellant, in the opinion of this court, did most certainly violate 8(b)(1)(A), did most certainly violate 8(b)(2) (i.e., see *Krambo Food Stores, Inc.*, 114 N.L.R.B. 241 (1955)) and probably caused the employer to violate 8(a)(3),<sup>6</sup> all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the National Labor Relations Board and are *not* subject to adjustment by, or interference with, Idaho courts. However, in addition to at least three unfair labor practices appellant did commit a breach of the contract between itself and W. P. Lockridge, a member. That contract provided that Lockridge would have continued membership in his union so long as he paid his dues no later than the end of the

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<sup>6</sup>"Sec. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section [9(a)] \* \* \*; *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;" (29 U.S.C. § 158(a)(3))

second month after they became due. None of the cases cited by appellant stands for as broad a proposition as that for which appellant contends. Preemption is not established simply by showing that the same facts will sustain two different legal wrongs. This would be analogous to precluding a contract action by proving the facts also establish a tort. The conflict to be avoided is two different bodies, analyzing the same facts, reaching the same or different interpretations of those facts and apply [sic] conflicting remedies. In this case, as will be pointed out later, the conflict between this court and the N.L.R.B., if extant, is not significant and the result we reach is consistent with the underlying policy of the national labor legislation.

Of course, it is not enough to simply state that this is an internal union matter. The "internal union matter" must be of a particular nature. The suit must be limited so that it focuses "on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought [must be] restoration of union membership rights." *Plumbers Union v. Borden*, 373 U.S. 690 at page 697; *International Assn. of Machinists v. Gonzales*, 356 U.S. 617. From the outset respondent attempted to regain his membership. This is the import of all his correspondence with the union. The only record of contact with the employer are the two letters from Greyhound informing him of his termination. The only relationship his employment has to this case is a means by which damages can be computed. The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief. His prayer for equitable relief was framed in general terms and this court concludes that in this case or any other within the narrow area where we can assert jurisdiction to relieve



wrongfully denied membership, the primary relief which can and shall be granted is restoration of union membership. Damages, if any, are a secondary consideration, and shall be limited to compensation for damage suffered until such time as membership is restored.

Restoration of union membership is not a remedy which the N.L.R.B. can afford. *International Assn. Machinists v. Gonzales*, supra. Under the law of Idaho, membership in a labor union constitutes a contract between the member and the union. *Lockridge v. Amalgamated Ass'n of St. El. Ry. & M.C. Emp.*, 84 Idaho 201, 370 P.2d 798 (1962). Our decision in this case is designed solely to give "legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein'". *International Assn. Machinists v. Gonzales*, 356 U.S. at page 620. The purpose for which we exercise jurisdiction is to avoid leaving "an unjustly ousted member without remedy for the restoration of his important union rights." "Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act." *Gonzales*, 356 U.S. at page 620.

As previously pointed out, there may have been violations of the Act, but the Board in such a case would focus on the union-employment relationship and order restoration of employment. The Board's power to make such an order and determination precludes any such determination by this court or any interference by the court with the employee-employer relationship. However, the Board cannot restore membership in the union; this court can. *Gonzales*, supra. Also, the National Labor Relations Board could not give respondent the relief that Idaho law can give him according to our local law of contracts and damages. Additionally, the possibility of partial relief from the Board does not, in such a case as is here presented,

deprive a party of available state remedies for all damages suffered.

“If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court’s award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: ‘Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board’s determination with reference

to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A.B.A.J. 415, 483." (*International Assn. Machinists v. Gonzales*, 356 U.S. pages 621 through 623.)

This, then was the state of the law and its application to this case at the time of the *Gonzales* decision. However, appellant insists that this decision is altered by subsequent cases.

The landmark case, cited as the genesis of the trend limiting *Gonzales*, is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959). *Garmon* was written by Justice Frankfurter, author of the *Gonzales* decision. The case itself arose out of a recognition dispute between two unions and an employer. It involved conduct which represented one of the vital tools of organized labor and a protected right for all employees—picketing. The parties disputed over whether the picketing was unprotected coercion or protected publicity. The N.L.R.B. declined jurisdiction. California courts asserted jurisdiction because the Board had declined to do so and then the state courts enjoined the picketing. Justice Frankfurter, in reversing the state court decision, began by quoting from *Weber v. Anhauser Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955):

" 'By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the

operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union*, *supra* [346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228]. But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much." 346 U.S. at page 488, 74 S.Ct. at page 164. This penumbral area can be rendered progressively clear only by the course of litigation.' " 359 U.S. at page 240.

Justice Frankfurter then expanded on these basic considerations:

"We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018.

Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction we could not infer that Congress had deprived the States of the power to act." 359 U.S. at pages 243-44.

The central rule of the case was then reached, in the following language:

"When it is clear or may fairly be assumed that the activities which a State purported to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U.S. at page 244.

In applying this rule to the facts it was pointed out that the particular conduct sought to be regulated was assumed to be, and was treated as, an unfair labor practice.

"The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act." 359 U.S. at page 245.

The court concluded that it did not matter whether this was protected or prohibited activity, or even whether the Board asserted jurisdiction. The issue, then was, was this a *class or type* of conduct which was *arguably* subject to the Board's cognizance, which by their administration and promotion of the policies of the act could best be handled?

Was there "uncertainty" as to whether an act or practice would be protected or not?

The distinction between the type of conduct in *Garmon* and the type of conduct here is clear. The former involved the most fundamental aspects of concerted action, the very heart of the national labor policy, over which the regulatory power of the Board has never been questioned. Here the conduct centers on membership rights in the union, critical from an individual member's viewpoint, but conduct, excluded from the operation of the act. The remedy sought here does not impair the assertion of collective rights but rather, guarantees the availability of those collective rights to individual members. As can be no more clearly presented than by the facts in this case themselves, if this court did not assert jurisdiction, respondent would never regain his union membership.

Appellant, however, insists that the "arguably subject" test is the one which now applies to this class of cases, citing *Plumber's Union v. Borden*, 373 U.S. 690, 10 L.Ed.2d 638, 83 S.Ct. 1423 (1963), and *Iron Workers v. Perko*, 373 U.S. 701, 10 L.Ed.2d 646, 83 S.Ct. 1429 (1963). However, Justice Harlan, in those cases specifically distinguished the situations presented there from *Gonzales* and he pointed to many important policy questions involved in those cases which were more properly to be decided by the Board.

*Borden* and *Perko* never sought reinstatement in the union. *They had never been denied their membership.* In both cases the individuals complained that they had been denied the benefits of a *particular* job. *Borden* wanted to work for a particular employer and was, for apparent disciplinary reasons, refused a necessary referral by the union. *Perko* complained that he was not able to work as a foreman or superintendent. The court said of *Perko*:

"As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or

prospective employment relations *and was not directed to internal union matters.*" 373 U.S. at page 705 (emphasis added)

Furthermore, *Borden* involved "difficult and complex problems inherent in the operation of union hiring halls" while *Perko* presented "difficult problems of definition of status and coercion \* \* \* of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole."

The result we reach is contrary to that reached in *Day v. Northwest Division 1055, et al*, 389 P.2d 42 (1964). However, in *Day* there is a specific finding of discrimination on the part of the union. In light of such a finding an unfair labor practice would be established. There was no such finding in this case and the conclusion of the court below is one amply supported by the evidence and one in which we concur. This was a misinterpretation of a contract. Whatever the underlying motive for expulsion might have been, this case has been submitted and tried on the interpretation of the contract, not on a theory of discrimination. The fact that the Board might go deeper into the union motivation and discover an unfair labor practice simply serves to point up the distinction between the facts we focus upon and those which the Board would focus upon. That the Board might find an unfair labor practice in both an underlying "discriminatory" motivation and an honest misunderstanding of the contract, is simply a determination which is necessary to establish the Board's jurisdiction and its power to enforce the remedies within its cognizance.

However, aside from this distinguishing point in *Day*, we also believe that the majority there took too shallow a view of the case law and pertinent legislation. Rather, we believe the opinion of Justice Perry, dissenting, to be the better reasoned.



After the trial on the merits, the trial court made certain findings of fact to which appellant has made no assignments of error on appeal and therefore such findings are necessarily binding on this court. Among such findings are the following:

“That on November 2, 1959, plaintiff [respondent herein] had over 16 years seniority as a bus driver under the laws of the union and the employment contract, and such seniority commensurate rights and benefits and working privileges and compensation to be received therefrom.

“That on or about November 2, 1959, C. A. Bankhead, treasurer and financial secretary of Division 1055, acting in his official capacity and within the scope of his activities as a treasurer and financial secretary and, under the facts and reasonable inferences to be drawn therefrom, acting for the International Association and pursuant to the knowledge and approval of it, if not direct advice or ordered from, the International Association president, and International vice-president, and a member of the general executive board of the International Association, suspended plaintiff from membership in the union *on the sole grounds that plaintiff was in arrears in payment of dues contrary to the requirements of the constitution and general laws of the union*, and by letter dated November 2, 1959 notified the employer Western Greyhound Lines that plaintiff was no longer a member in good standing in the union and requested said employer to remove him from employment. That immediately following receipt of such notice from C. A. Bankhead, the employer discharged plaintiff from employment. One Elmer Day was likewise suspended under identical circumstances. (emphasis added)

“That at the time plaintiff's wife was notified of plaintiff's suspension from union membership in early

November, 1959 (plaintiff was elk hunting during a vacation period) plaintiff's wife, by letter dated November 10, 1959, submitted to C. A. Bankhead, financial secretary of the Division 1055 a check to cover plaintiff's dues for both October and November but the said C. A. Bankhead refused to accept the same and the check was returned (Exhibit 5).

"Following his return to Boise in mid November, 1959, and immediately upon learning of his suspension from union membership with resulting termination of his employment, plaintiff contacted C. A. Bankhead requesting advice as to what he could do to obtain reinstatement of his union membership *and on several occasions submitted checks for his arrearages and penalties all of which were refused.* (emphasis added) \* \* \*"

The trial court additionally found that section 93 of the union constitution provided:

"that where members are in arrears past the last day of the second month they shall, at the last meeting of each month, be reported by the financial secretary as having suspended themselves from membership except where members are suspended in compliance with the terms of agreements, the members *may* be so reported and suspended after the period of one month. That at the time of their suspension from membership in the International Association on or about November 2, 1959 plaintiff and said Day were in arrears in payment of their dues only since the first day of October 1959."

As previously mentioned in this opinion, no appeal has been perfected from any of the findings of fact. Additionally, on the basis of what respondent's replacement, a man named Carter, actually earned in the years 1959

through September 15, 1965, in the same employment which respondent had prior to his unlawful suspension by the union, the court found that during that period respondent had suffered a loss in earnings of approximately \$32,678.56, i.e., the difference between what he would have earned at his regular employment as a bus driver and what he did earn as an employee of the Highway Department of the State of Idaho, and on that basis the trial court awarded respondent damages for loss of wages in the sum of \$32,678.56. In the judgment the trial court further decreed that the respondent be restored to membership in the union upon tendering payment of his current dues.

As it was first rendered and filed, the judgment also provided that respondent should be restored to his seniority rights. However, upon motion to amend the findings of fact, conclusions of law and judgment, the trial court, after hearing thereon, struck from the decree and from the findings and the conclusions such restoration of seniority rights and also a provision allowing the respondent the sum of \$3,500 per year in damages from the union from and after September 15, 1965 until he had been restored to membership and full seniority rights. This is the state of the judgment from which the appeal was taken on the three contentions by appellant, disposition of which has already been made.

Respondent by way of cross-appeal raised several issues, the most important of which is that of restoration of seniority rights. In order to grant respondent the full equity to which he is entitled, in addition to the money damages awarded him by the trial court, he must necessarily be restored by the appellant union to full seniority rights. The trial court, therefore, was in error, in striking from the findings of fact and conclusions of law and the judgment the restoration of such rights, upon motion of appellant. Upon remanding of this cause the trial court is hereby ordered to restore these rights of seniority to respondent.

Respondent additionally contends that the trial court erred in not awarding damages in the amount of overtime compensation which Lockridge could have worked. The trial court was the finder of facts and since the court was not convinced that Lockridge could or would have worked the overtime in question, this portion of the judgment is affirmed.

Finally, respondent prayed for damages of \$50,000.00 for discomfort, embarrassment, humiliation and mental anguish and the trial court specifically found that such elements did exist from the facts adduced at the trial but omitted to award any sum for such damages. Respondent assigns this as error. Such damages must necessarily be based upon mental suffering and the attempt to recover them from a breach of contract has generally been met with disfavor by the courts. Denial of damages is based upon several grounds, e.g., remoteness of the injury from the breaching act; lack of an adequate standard or measure of such damages; the danger of speculative and easily simulated injuries which would be difficult to disprove; and the inevitable fear of increased litigation. There is a growing tendency to consider mental damages as a proper element in these actions just as in actions sounding in tort; but this is definitely a minority viewpoint, and we choose to adhere to the majority holdings which deny such recovery. See 32 Notre Dame Lawyer 482. Thus the trial court committed no error in not awarding such damages to respondent.

In thus disposing of the various contentions of the parties we reach a decision which, rather than conflicting with federal labor policy, seeks to strengthen an underlying philosophy of that policy, i.e., one is entitled to gainful employment and the fruits of collective bargaining; and this is so, regardless of the employee's attitude toward the union or his failure to cooperate with a certain union policy—such as the automatic checkoff—with which he

personally disagrees. The policy considerations behind this decision do not militate against the discipline which is necessary to preserve the goals of concerted action, but rather militate in favor of the basic purpose for which national labor law was created: to provide the workingman with a fair share of the fruits of his labor.

Judgment affirmed, as modified, and remanded for restoration of respondent's seniority rights in the union, such judgment further reserving to respondent the right to petition the district court for final determination of damages for loss of earnings accruing since September 15, 1965. Costs to be shared by the parties as agreed in the instrument dated October 17, 1966.

McFADDEN and DONALDSON, JJ., and SCOGGIN, D.J., concur.

McQUADE, J., dissenting.

The majority today reaches a position which is, perhaps, tenable as a matter of pure logic.<sup>1</sup> I cannot, however, agree with them that it is the law. They attempt to fit this case within the too-narrow "internal union matter" exception to the doctrine of federal pre-emption in labor law. That niche is entirely too small to accommodate this particular action. Although this ground has been plowed here before,<sup>2</sup> a recapitulation of the United States Su-

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<sup>1</sup> See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv.L.Rev. 641 (1961). Professor Michelman, in that thoughtful if not wholly realistic article, observed: "The more state courts are hemmed in by sweeping pre-emption rules which prevent them from reaching a sensible decision on the facts of a particular case, the more they are likely to struggle to evade or to avoid the rules. The disposition of difficult cases may not be greatly facilitated, and there will be some compulsion to a kind of lawlessness in the federal system which cannot be effectively policed." *Id.*, at 683. That observation applies acutely to this case.

<sup>2</sup> *Cox's Food Center, Inc. v. Retail Clerks Union, Local No. 1653*, 91 Idaho 274, 420 P.2d 645 (1966).

preme Court cases, and the principles which may be derived therefrom, may serve to indicate more precisely the errors upon which the majority opinion is founded.

For over a decade prior to 1959, the Supreme Court sought delicately to adjust the relationship of state and federal powers in the area of labor adjudication in order optimally to serve the competing purposes of the national labor legislation and the values of our federal system. Although that process contributed greatly to the confusion with which we are involved in this case, a recapitulation of a few of the leading cases of that period will serve to explicate the full scope of the pre-emption doctrine announced in *San Diego Building Trades Council v. Garmon*.<sup>3</sup>

The first of the important cases was *Garner v. Teamsters Union*,<sup>4</sup> which involved an attempt to induce the State of Pennsylvania to enjoin picketing which was fairly clearly a matter for the N.L.R.B. In the course of an opinion holding the dispute not to be a proper object of state jurisdiction, a number of elements, thought to be important in pre-emption cases were discussed. That case was distinguished from those involving injurious conduct which the National Labor Relations Board had no express power to prevent and which was, therefore, either "governable by state law or it is entirely ungoverned." And the case was found to be one not involving mass picketing or threats to the public peace and safety and, therefore, a "local matter."

In *Garner* there were three principles upon which the affirmative holding of pre-emption was founded. The first was the oft-repeated theory that the very core of the pre-emption doctrine was a conflict of remedies. Justice Jackson seemed to mean that if a state court would pro-

<sup>3</sup> 359 U.S. 236 (1959).

<sup>4</sup> 346 U.S. 485 (1953). The labor law pre-emption theory dates at least back to *Hill v. Florida*, 325 U.S. 538 (1945).

vide a sanction for conduct which was subject to N.L.R.B. cognizance when the federal tribunal would not allow such a sanction, then there was a "conflict between state and federal remedies." This actually seems to mean that the conflict to be avoided is between differing substantive standards of primary and not remedial law, but Justice Jackson phrased it in terms of remedies and that phrasing was very important until *Garmon*, six years later. The second principal leg for *Garner* was that the federal labor law plan not only comprehended a set of new rules, but also a new tribunal, with its own procedure and system of remedies; this was a comprehensive system of regulation, interference with any part of which was likely to damage the entire fabric. "A multiplicity of tribunals and a diversity of procedures are quite as likely to produce incompatible or conflicting adjudications as are different rules of substantive law." And the final leg for the *Garner* decision was a corollary to the other two. It was that, when a matter was subject to the invocation of the federal labor law, the congressionally devised Labor Board had primary jurisdiction to interpret the substantive law expertly and uniformly.

The next key case was *United Construction Workers v. Laburnum Constr. Co.*<sup>5</sup> This case involved a series of riotous attempts by a subsidiary union of the United Mine Workers to organize some A.F.L. employees of a building contractor who happened to have a job in coal-mining country. The state court tort judgment was upheld by the United States Supreme Court as not preempted. In so holding that Court assumed that the conduct involved constituted an *unfair* labor practice. The *Garner* case was distinguished therein, because in that case Congress had provided a preventive remedy exactly parallel to that which the state court was asked to impose. *Laburnum*, it was said, involved no such conflict of remedies because "Con-

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<sup>5</sup> 347 U.S. 656 (1954).



gress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." Pre-emption was, thus said to turn on whether or not the N.L.R.B. could give the same relief which the state sought to provide. Justice Douglas filed a dissent in *Laburnum*.<sup>6</sup> It was his position that the federal law was a comprehensive system of rules, procedures and remedies which was designed to avoid disruptions of commerce by bringing labor disputes to orderly and rapid conclusions. The provision of an alternative, lucrative state court remedy would upset this delicate balance and cause controversies to live long in the courts, depriving the federal scheme of its healing effects and keeping old wounds open.

Following *Laburnum*, the next case which attempted further to elucidate the theoretical underpinning of pre-emption was *Weber v. Anheuser-Busch, Inc.*<sup>7</sup> In that opinion, holding that a state anti-trust law injunction would not lie, Mr. Justice Frankfurter reiterated the *Garner* theory of primary jurisdiction to decide what was prohibited and what protected and the notion that the crux of the pre-emption matter was the conflict of remedies. *Garner* was, thus, said to turn on the fact that there were "two similar remedies, one state and one federal, brought to bear on precisely the same conduct." And it was on this ground that the *Laburnum* case was distinguished, "the violent conduct was reached by a remedy having no parallel in and not in conflict with, any remedy afforded by the federal Act." While much of this still sounded as if a conflict of primary rules was the difficulty, the reference to *Laburnum* only served to emphasize that it was competition among remedies which was considered crucial. *Weber* finally declared that it did

<sup>6</sup> 347 U.S. 656 at 671.

<sup>7</sup> 348 U.S. 468 (1955).

not matter that the state power was invoked to serve some regulatory purpose other than the ordering of labor relations. The pre-emption doctrine protected the N.L.R.B.'s primary jurisdiction to characterize and remedy conduct. Competition with that competence from state tribunals was not to be countenanced on any theory.

The final pre-*Garmon* cases which are important here are the *Gonzales*<sup>8</sup> and *Russell*<sup>9</sup> cases wherein the court was again able to hold no pre-emption. These two cases might be said to have represented the high-water mark of concurrent state jurisdiction in labor law. The *Russell* case involved a very ambiguous fact situation stemming from conduct which was either very nearly as egregious as that in *Laburnum* or else no more disorderly than might be expected in any tense, major strike. In upholding an award of exemplary and compensatory damages (as compensation for lost wages during the strike) the United States Supreme Court further muddled the waters. Where *Garner* had rejected a distinction between actions to vindicate public rights from those to compensate private rights and where *Weber* had rejected the notion that there was a relevant distinction between state general law and state labor law, the *Russell* case seemed to go in exactly the opposite direction. Although there was an N.L.R.B. remedy which exactly duplicated the compensatory damages for lost wages, the *Russell* opinion held that there was no conflict of remedies. This, it was reasoned, was because the principles which supported the state court action were private principles of general law, while those underlying the N.L.R.B. action were designed to vindicate public rights and "to effectuate the purposes of the Federal Act." Therefore, it was said, precisely the same sanction directed

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<sup>8</sup> *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958).

<sup>9</sup> *Automobile Workers v. Russell*, 356 U.S. 634 (1958).

at precisely the same conduct (and justified by findings of a non-expert, non-federal tribunal) did not constitute a conflict of remedies. After *Russell* it could reasonably be said that general state tort law sanctions could be freely directed at labor relations activity which, based upon state court findings of fact, was not protected by federal law.

*Gonzales*, upon which the majority relies so heavily, was decided on the same day as *Russell*. It was a California contracts case in which a union member, who claimed to have been wrongfully expelled from his union, was ordered reinstated and given damages for lost wages as well as for mental and physical suffering caused by the union's breach of contract. Justice Frankfurter, again writing for that Court, admitted that there might be an unfair labor practice made out by the facts, but preferred to characterize the action solely as one giving effect to a union member's rights without reference to extra-union employment or labor relations factors. This was so even though the damages given closely paralleled the award which the National Labor Relations Board could have imposed if it had found an unfair labor practice. The possibility of conflict with national labor policy was, for no articulated reasons, said to be "too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."<sup>10</sup> This conclusion, which in terms of legal and logical argument was mere *ipse dixit* was "emphasized" by an examination of [the] way in which the lower courts and the parties characterized the action. It was a contracts action and, therefore, it served "internal" purposes. If it had been a labor law case, presumably it would have been "external" and pre-empted. Justice Frankfurter's examination of the theory of the pleadings

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<sup>10</sup> 356 U.S. 617, at 621.

to establish the distinction between the state's focus on internal union matters and the national focus on external labor relation matters smacks somewhat of the aridity of the ancient forms of action.

After 1958 it might readily be concluded that there was a wide area of activity, or cases, or remedies which were solely the province of the National Labor Relations Board. And, especially after *Gonzales* and *Russell*, it could be as well concluded that there was as wide an area which was subject to the concurrent jurisdiction of the state and national tribunals. There was not, however, any well-evolved set of clear principles which could be applied to determine into which category a given case might fall. As we pointed out the first time that Mr. Lockridge's litigation was before us the law in the area was confused and unsettled.<sup>11</sup> The various cases seemed each to announce a new rationale repugnant to the last. The difficulty, as the justices had never ceased to mention and as professor, and later solicitor general, Cox had early pointed out, was that Congress had never delineated the boundaries of the two jurisdictions.<sup>12</sup> The Supreme Court had attempted to fill this breach by statutory interpretation which was based on the assumption that there had to be some, but not much, concurrent state jurisdiction.<sup>13</sup> Professor Cox had rightly warned that this allowance of simultaneous jurisdiction over the same matter would ultimately lead to excessive litigation and confusion as every point of state law would ultimately have to be passed

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<sup>11</sup> *Lockridge v. Amalgamated Ass'n of St. El. Ry. & M. C. Employees*, 84 Idaho 201, 208, 369 P.2d 1006 (1962).

<sup>12</sup> See Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L.Rev. 1297 (1954).

<sup>13</sup> Compare *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958), and *Garner v. Teamsters Union*, 346 U.S. 485 (1953), with *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957).

on by the United States Supreme Court.<sup>14</sup> That Court's effort to draw the jurisdictional boundaries according to sensitive, subtle judgments about the relative positions of the competing state and national interests through a process of "litigating elucidation" on a case by case basis had, as we have seen, come a cropper. The justices had simply been unable to state coherently what the controlling considerations were. Some of the supposed "principles," especially the notion of conflict of remedies, seemed to be tenuously related to considerations of national labor policy at best. It was this background against which the strict, even "wooden" rule of the *Garmon* case stands so starkly. A careful reading of *Garmon* indicates that in it, the majority of the Supreme Court, led again by Justice Frankfurter, embarked on a new course departing substantially from the line of decisions which preceded it.

The majority opinion in *San Diego Building Trades Council v. Garmon*<sup>15</sup> began by describing the difficult process of attempting to give meaning to a statutory framework which was vague, poorly foreseen or utterly unperceived as a process of "giving application to congressional incompleteness." This complaint of congressional inactivity was followed by a plea that, if a better and more sensitive demarcation than that provided by the courts was wished, it was up to the Congress to draw better and more precise boundaries by enactment. This suggested action, echoing Professor Cox's argument made five years before, if it had been acted upon by the National Congress, might well have saved the parties and the courts of Idaho most of the time and money expended in litigating the jurisdictional question in this case.

Having concluded that the legislature had not given the courts much guidance, Justice Frankfurter explicitly

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<sup>14</sup> Cox, *supra* note 12, at 1315-1317.

<sup>15</sup> 359 U.S. 236 (1959).

disavowed the attempted, subtle, case-by-case decisional process of the preceding decade.

"The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause."<sup>16</sup>

This is directly at war with the spirit of "elucidating litigation" which had animated the previous cases. But, if this were not enough, the point was emphasized as Justice Frankfurter began to review the law derived from the cases. Not all reasoning in them was of determinative importance, and much of the language used in the past did not articulate the principles upon which the decisions rested:

"We state these principles in full realization that, in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved."<sup>17</sup>

And, in any event, the process of elucidation was now over, and the court was going to state the correct rules to decide cases based on a decade's experience. *Garmon* was clearly and consciously meant to strike a new course.

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<sup>16</sup> 359 U.S. 236, at 242.

<sup>17</sup> 359 U.S. 236, at 241.

But a new course as to what? The majority in today's opinion would restrict *Garmon* to cases involving picketing. Justice Frankfurter's words, however, do not support that conclusion. The issues decided by the *Garmon* case were framed as broadly as possible.

"The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. \* \* \* The extent to which the variegated laws of the several states are displaced by a single, uniform, national rule  
\* \* \* 18

There was no broader way to frame the issue in the case. When a justice as experienced, precise and lawyer-like as was Justice Frankfurter so obviously chooses to have a case cover the most ground possible, we can only conclude that the decision to be doctrinaire was purposeful.<sup>18</sup>

Having clearly indicated that *Garmon* was to state a new rule for the entire catalogue of labor law pre-emption cases, the opinion went on to state the salient considerations which underlay the new doctrine.

"The unifying considerations of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency armed, with its own procedures and equipped with its specialized knowledge and cumulative experience."<sup>20</sup>

Citing *Garner*, the court also noted that the N.L.R.B. had as an expert tribunal, primary jurisdiction over questions

<sup>18</sup> 359 U.S. 236 at 241.

<sup>19</sup> See Currier, *Defamation in Labor Disputes: Preemption and the New Federal Common Law*, 53 Va.L.Rev. 1, 2, 7-14; Michelman, *supra* note 1, at 648.

<sup>20</sup> 359 U.S. 236 at 242.



within its competence.<sup>21</sup> And, most importantly, the court referred to the completeness of the federal regulatory scheme, the dense interrelationship between the rules, the administrative process, the expert agency and the remedies. Therefore pre-emption was necessary whenever this delicate and purposeful national law system might be encroached upon in any way.

“When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 \* \* \* [or prohibited by] § 8 due regard for the federal enactment requires that state jurisdiction must yield.”<sup>22</sup>

And, because it is often not clear when matters are subject to either section or are meant to be utterly unregulated and because the pre-eminent principle is complete respect for the federal scheme,

“When an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference is to be averted.”<sup>23</sup>

The governing consideration was the necessity of absolute avoidance of even potential interference with federal labor policy.

There were only two narrow exceptions allowed to this rule of practically total pre-emption. The first was con-

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<sup>21</sup> 359 U.S. 236 at 242-243, 244. The doctrine of primary jurisdiction, originally designed to protect the uniformity of Interstate Commerce Commission rules, has turned chiefly on the alleged expertness of federal administrative bodies in recent years. L. Jaffe, *Judicial Control of Administrative Action* 121-151 (1965).

<sup>22</sup> 359 U.S. 236 at 244.

<sup>23</sup> 359 U.S. 236 at 245.

duct which breached or threatened to breach the public peace. The *Laburnum* and *Russell* cases were limited in their holdings to this narrow rule. The second exception was conduct which was of only "peripheral concern" of the Act. *Gonzales* was the only case cited for this last proposition.

And, finally, *Garmon* rejected much of the reasoning in the old cases. Remedies, conflicting or otherwise, were no longer determinative. The language about conflicting remedies in *Laburnum* was explicitly rejected. It was conduct alone which was regulated. If the conduct *even arguably* came within the scope of the national policy, all adjudication about it had to be commenced in the N.L.R.B. Also the distinctions between general laws and specific labor regulation, or those based on the characterizations of the parties, juries, or state tribunals were not of importance. It was, again, state regulation of conduct—no matter on what theory—which was to be avoided. If the activities which inspired the litigation were even arguably among those which had been entrusted to the judgment of the expert National Labor Relations Board for application of the comprehensive scheme of federal rights and remedies, then jurisdiction was solely in the national board. Any intervention in such areas by the inexperienced state courts, even if the Board would not, in its discretion, choose to rule on the merits, was absolutely prohibited by *Garmon*.

The *Garmon* case, thus, represents a watershed in the jurisprudence of pre-emption. It purported to be and was a complete break with the decisions in the past. It stated a simple, omnibus rule: if conduct was even arguably subject to adjudication by the expert National Board it was ungovernable by state power. It narrowed the permissible scope of state jurisdiction to conduct which threatened good order or which was utterly irrelevant to national policy. And it foreclosed recourse to the con-

fused jumble of cases out of which it was born. It was now to be the rule in *Garmon's* case which was to control. The preceding cases had vitality only to the extent allowed them by *Garmon*. The rule was intentionally crude, even "wooden", because it was, at least in part, designed to provide a "bright line" for deciding jurisdictional issues and, thereby, to cut off the cascade of state court litigation which the cases through *Russell* and *Gonzales* threatened to inspire.<sup>24</sup> It is possible that in declaring this unsubtle rule in reaction to the confusion of the preceding decade, the Supreme Court of the United States was guilty of throwing out the baby with the bath water. But even if that is so, under the Supremacy Clause this court has no choice but to follow that lead. *Garmon* is absolutely the controlling case.

While it was not perfectly clear that *Garmon* was the determinative decision when this case first came before this Court over seven years ago, it is now indisputable. In the ten years since the *Garmon* decision the cases in the United States Supreme Court<sup>25</sup> and in the state courts<sup>26</sup> which recognize the supremacy of the rule in that case are legion. The most important among these for our purposes are the *Borden*<sup>27</sup> and *Perko*<sup>28</sup> cases which

<sup>24</sup> Currier, *supra* note 19, at 7-14; Michelman, *supra* note 1, at 648; Updegraff, *Preemption, Predictability and Progress in Labor Law*, 17 Hastings L.J. 473, 484-485.

<sup>25</sup> *E.g.*, *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, (1962); *Hanna Mining Co. v. Dist. 2, Marine Engineers Ben. Ass'n*, 382 U.S. 181 (1965).

<sup>26</sup> *E.g.*, *Cox's Food Center, Inc. v. Retail Clerks Union, Local No. 1653*, 91 Idaho 274, 420 P.2d 645 (1966); *Day v. Northwest Division 1055*, 389 P.2d 42 (Ore., 1964); *Fullerton v. International Sound Technicians*, 194 Cal.App.2d 801, 15 Cal. Rptr. 451 (1961); and cases cited in Currier, *supra* note 19, at 2 n. 7.

<sup>27</sup> *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 701 (1963).

<sup>28</sup> *Local No. 207, International Ass'n of Bridge, etc., Iron Workers v. Perko*, 373 U.S. 701 (1963).

the majority attempts, unsuccessfully, to distinguish from *Lockridge*. Those cases did not turn on the fact of membership or non-membership in the defendant union. The touchstone in each of those cases was a denial of the rights of a union member which effectively caused that member to be deprived of employment which he otherwise had. The form or theory of the pleadings, whether the action sounded in contract or in tort or was a hybrid labor relations case did not matter. After *Garmon* the key to analysis, when pre-emption is urged, is the character of the conduct. In *Borden* and *Perko* the court catalogued the ways in which the conduct complained of could "reasonably" arguably have been characterized by the expert National Labor Relations Board as either § 7 or § 8 conduct. This discussion, required for decision after *Garmon*, is what the majority refers to when it says "Justice Harlan \* \* \* pointed to many important policy questions involved in those cases which were more properly to be decided by the Board." That lengthy treatment is not needed in this instance; the majority concedes that the conduct complained of did indeed constitute an unfair labor practice. Following *Borden* and *Perko* and *Garmon*, that concession is all that is needed; the conduct is § 8 activity; jurisdiction is, therefore, pre-empted.

The majority, however, attempts to rely on the "distinction" which Justice Harlan drew between the *Borden* and *Perko* cases and *Gonzales*. The *Gonzales* case was different because, according to Justice Harlan, it "turned on the Court's conclusion that the lawsuit was focused on purely internal union matters."<sup>29</sup> That, the majority would urge us to believe is also true here. There are two answers to that contention. The first is to hypothesize Mr. Lockridge's answer if we were to ask him if he would like his union membership back or his seniority rights and his damages, but not both. And the second answer, a corollary of the first, is that it is impossible to say

<sup>29</sup> 373 U.S. 690 at 697.

that this Court in this case has not focused sharply on *conduct* touching Lockridge's employment relation when *all* of the relief—excepting restoration of simple union membership—necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement? And that determination is not “merely peripheral” to the Act nor is it one which involves wholly internal union matters. The conclusions which the Court has made in this case today are on precisely the sort of “difficult and complex problems” which, under the primary jurisdiction rationale of *Garmon*, are solely within the competence of the expert National Labor Relations Board. The problems of interpretation of the union charter and the bargaining contract here are no less difficult than are some of the “problems of definition” consigned to the Board in *Perko*. It is not, despite the *ipse dixit* of the majority, “obvious . . . that Lockridge was *not* subject to suspension or dismissal.” And it is not for us to decide if our intrusion into the regulation of this conduct will “not militate against the discipline which is necessary to preserve the goals of concerted action, but rather militate in favor of the basic purpose for which national labor law was created.” That determination, no matter what may be our own view of our competence, has been taken from us and vested wholly in the expert N.L.R.B., as a matter of federal law, under the *Garmon* rule. Whatever the current status of the *Gonzales* case might be, it is clear that the rule in the *Garmon* case, as applied in *Borden* and *Perko*, requires that the courts of Idaho refuse to assert the jurisdiction which they do not have in this case.

To make one point for a second time, the concession that the conduct regulated in this instance did probably constitute an unfair labor practice (which conclusion is

not that, terribly clear) should have ended this case. The statement by the majority that:

"Pre-emption is not established simply by showing that the same facts will sustain two different legal wrongs. This would be analogous to precluding a contract action by proving the facts also establish a tort,"

grossly misinterprets the *Garmon-Perko-Borden* rule which specifically rejects the notion that what is important is the theory upon which a case is tried. The rule is if conduct which is to be regulated is reasonably arguably covered by § 7 and § 8 of the Act, then the jurisdiction to regulate that conduct belongs solely to the national agency.

The correct rule is clearly a crude, simple device. It fails to make subtle distinctions "in order to ascertain the precise nature and degree of federal-state conflict \* \* \* and more particularly what exact mischief such a conflict would cause."<sup>30</sup> It is thus on purpose. It is designed to avoid the sort of confused and unbelievably protracted litigation with which we are faced in this case. It should have been allowed to have effect the first time this case came to this Court well over seven years ago. It should, as a function of our position in the federal system as defined by the Supremacy Clause, be given effect even now.

The Supreme Court of the United States sought for a decade to devise a better rule. It could not. The rule which we have in *Garmon* is at least easy to apply—and we should apply it. If we are unhappy with this situation we can only plead with those responsible for the dominant federal law—the United States Supreme Court, and, more importantly, the Congress—to make a change.

<sup>30</sup> *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

**APPENDIX I**  
**CONSTITUTIONAL AND STATUTORY**  
**PROVISIONS INVOLVED**

**Constitution: Supremacy Clause**

Article VI, Section 2 of the Constitution of the United States reads in pertinent part as follows:

“This Constitution and the Laws of the United States which shall be made in Pursuance thereof \* \* \* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

**National Labor Relations Act: Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2)**

The pertinent statutory provisions are the following, in the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*:

*Section 7*, 29 U.S.C. § 157, provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] of this title.”

*Section 8(a)(3)*, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer:

“by discrimination in regard to hire or tenure of employment or any term or condition of employment



to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, \* \* \*: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization \* \* \* (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

*Section 8(b)(1)(A)*, 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce \* \* \* employees in the exercise of the rights guaranteed in section [7]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein \* \* \*."

*Section 8(b)(2)*, 29 U.S.C. § 158(b)(2) provides in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—\* \* \* to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

No. ~~7072~~

**76**

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF  
AMERICA, an International Labor Union; and  
NORTHWEST DIVISION 1055 of the AMALGAMATED  
ASSOCIATION OF STREET, ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, a Region-  
al Division of the International Union,

*Petitioners,*

v.

WILSON P. LOCKRIDGE,

*Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF IDAHO**

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
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**PREFACE**

Appendices to Petitioners' brief contain those portions of the record and pertinent laws to which Respondent will make reference in this brief. In the interest of brevity and to avoid duplication, Respondent's references herein to portions of the record below or pertinent laws will be to the appendices to the petition.

### STATEMENT OF THE CASE

From May 16, 1943, to November 2, 1959, when the acts giving rise to this controversy occurred, Respondent had been a member of Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("union") and employed as a bus driver by Western Greyhound or its predecessors.

Section 91 of the constitution of the union provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership in the union. Section 91 additionally specifies that where agreement with employing companies provides that the members must be in continuous good financial standing, a member in arrears one month may be suspended from membership and removed from employment. The contract agreement pertinent to this case required that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to con-



tinued employment. It did not require the member be in good standing. (App. H - pp. 44a, 45a)

On or about November 2, 1959, the treasurer and financial secretary of Division 1055 of the union suspended Respondent from membership in the union on the *sole ground* that Respondent was in arrears in the payment of dues. One Elmer Day was likewise suspended. (App. G - p. 34a) At the time of such suspension from membership in the union, both Respondent and Day were in arrears in payment of their dues only from the 1st day of October, 1959. (App. G - p. 35a) The treasurer and financial secretary of Division 1055 notified the employer that Respondent and Elmer Day were no longer in good standing in the union and had suspended themselves from membership and accordingly requested they be removed from employment. This was done. (App. H - pp. 43a, 44a)

During the course of the litigation in the lower court Petitioners raised the defense that Respondent was in fact in arrears in his dues and subject to suspension from membership. The lower court ruled that Petitioners' interpretation of the union constitution and the employment contract was erroneous and that Respondent was not subject to suspension for nonpayment of dues until he was in arrears past the last day of the second month. (App. D - p. 22a) The interpretation and order of the trial court was not challenged by Petitioners as error on appeal to

the Idaho Supreme Court. (App. H - p. 50a) Only two other grounds were therefore raised on appeal: (1) Congress has pre-empted all state court jurisdiction over union-member relationships and (2) if the union was in error in its interpretation of the constitution and the employment contract, then in reality, Respondent was not suspended from the union for nonpayment of dues but must have been suspended for some other reason which constituted an unfair labor practice. (App. H - pp. 48a, 49a)

Elmer Day filed an unfair labor practice charge with the National Labor Relations Board but his petition was rejected by the Regional Director of the Board on the ground there was insufficient evidence of violation of the National Labor Relations Act. (App. H - p. 46a) It being obvious that Respondent would obtain no relief through the National Labor Relations Board, he filed an action against the union in state court, culminating in a second amended complaint upon which, with answer thereto, the case went to trial. (App. A - pp. 1a, 6a)

The trial court concluded that the acts of the union officers and agents in suspending Respondent from union membership were predicated *solely* upon his failure to tender periodic dues and ordered Respondent restored to union membership together with money damages represented by his loss of earnings. (App. G - pp. 40a, 41a) While Respondent sought relief on two counts, one sounding in

tort and the other for breach of contract (App. A - pp. 1a, 6a), judgment was awarded Respondent only for breach of contract (App. G - p. 40a) and the judgment was sustained on that basis. (App. H - p. 63a) Other damages sought by Respondent, in addition to loss of earnings, were denied as not being proper damages for breach of contract. (App. H - p. 63a)

### ARGUMENT

**I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE PRE-EMPTION PRINCIPLE AND THE CONTROVERSY IS NOT SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.**

Petitioners charge that the Idaho Supreme Court has flung down the gauntlet to this court on pre-emption and has contumaciously assumed jurisdiction over union conduct which they assert is certainly either protected activity or an unfair labor practice. Acrimonious rhetoric notwithstanding, such is not the case.

“\* \* \* Our decision in this case is designed solely to give ‘legal efficacy under state law to the rules prescribed by a labor organization for “retention of membership therein”.’ *International Assn. Machinists v. Gonzales*, 356 U.S. at page 620. The purpose for which we exercise jurisdiction is to avoid leaving ‘an unjustly ousted member without remedy for the restoration of his important union rights.’ ‘Such a

drastic result, on the remote possibility of some entanglement with the Board's enforcement of national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act.' *Gonzales*, 356 U.S. at page 620." (App. H - p. 53a)

The trial court found and concluded Respondent's suspension from union membership was predicated *solely* upon the ground of failure to tender periodic dues. No other premise was established. The treasurer and general manager of Division 1055, whose testimony was submitted through deposition, emphatically denied there was any other reason. Plainly and simply, the union interpreted the constitutional and contract provisions as requiring suspension when dues delinquency exceeded one month. The lower court interpreted these same provisions as requiring suspension only when the arrearages exceeded two months. The Idaho Supreme Court recognized this as a correct interpretation and further pointed out that Petitioners did not raise this question on appeal. (App. H - p. 50a)

In his second amended complaint Respondent sought damages and equitable relief and while his prayer for equitable relief was framed in general terms, the court below determined that the *primary* relief which should be granted to Respondent was restoration of his union membership and that dam-

ages were of secondary consideration. (App. H - pp. 52a, 53a) The court further concluded that the National Labor Relations Board could not give Respondent the relief obtainable under Idaho law (i.e. restoration of union membership, citing *Gonzales*). (App. H - p. 53a)

Since Respondent's suspension from union membership was predicated on the *sole* ground of non-payment of periodic dues and since restoration of union membership was the primary relief granted by the Idaho court, hasn't the state court here really dealt with arbitrariness and misconduct vis-a-vis the individual member and the union and hasn't the principal relief granted been restoration of union membership rights?

Total pre-emption has not been intended by Congress and that fact has been recognized by this court.

"The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of

the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between Respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. *A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership.* The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, *Labor Relations Law: Federal versus State*

Jurisdiction, 42 A.B.A.J. 415, 483." (*International Assn. Machinists v. Gonzales*, 356 U.S. pages 621 through 623.) (Emphasis supplied)

" 'By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union*, supra (346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228). But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U.S. at page 488, 74 S.Ct. at page 164. This penumbral area can be rendered progressively clear only by the course of litigation'." (*San Diego Building Trades Council vs. Garmon*, 359 U.S. at page 240.)

The Idaho Supreme Court recognized that the conduct involved in *Garmon* involved fundamental aspects of concerted action, the very heart of the



National Labor Policy over which regulatory power of the N.L.R.B. has never been questioned. In the instant case, however, the conduct centers on membership rights in the union, critical from an individual member's viewpoint but conduct excluded from the operation of the Act or of mere peripheral concern thereof. (App. H - p. 58a)

In the instant case the union did not attempt to coerce Respondent in the violation of any right guaranteed by Section 7 of the Act (App. I - p. 80a) nor does Respondent discern any violation of Section 8(a)(3) or 8(b)(1)(A). Petitioners however ingeniously assert that since their interpretation of the union constitution and employment contract was apparently in error and Respondent was not in truth sufficiently in arrears in his membership dues to warrant suspension, he must have been suspended on some grounds other than failure to tender periodic dues and therefore the union conduct falls outside of the exemption provided by 8(b)(2) of the Act and constitutes an unfair labor practice. It might be noted in passing that throughout the trial of the case Petitioners contended that their interpretation of the rules was proper and a retreat from this position and the contention that an unfair labor practice had been committed was raised for the first time on appeal to the Idaho Supreme Court. The mere fact that Petitioners erred in their interpretation of the constitution does not alter the clear

and undisputed fact that failure to pay dues was the *sole ground* for the suspension.

**II. BORDEN AND PERKO ARE DISTINGUISHABLE ON THEIR FACTS AND NOT DECISIVE OF THE ISSUE IN THIS CASE.**

Petitioners assert that *Plumbers Union vs. Borden*, 373 U.S. 690 and *Iron Workers vs. Perko*, 373 U.S. 701 are in conflict with the decision below. While admittedly, in *Borden* and *Perko*, this court appeared (though not without dissent) to be extending the pre-emption doctrine to its very outer limits, neither *Borden* nor *Perko* is persuasive here because both are readily distinguishable on facts and the majority opinion specifically recognized that the situations prevailing therein were different than those in *Gonzales*.

Neither *Borden* nor *Perko* was suspended from union membership and restoration of this paramount right was not involved in the relief granted by the state court.

In both *Borden* and *Perko* the crux of the controversy concerned interference with employment relations and was not directed to internal union matters (373 U.S. at 705). While those decisions appear to go one step further, they nevertheless are in keeping with *Garmon*.

Here, the crux of the controversy concerned internal union matters—union membership. The em-

ployment relationship was merely incidental, the loss of employment following only as an incident to the primary act — suspension from union membership for nonpayment of dues. Moreover, as emphasized by the Idaho Supreme Court, *Borden* involved “difficult and complex problems inherent in the operation of union hiring rules” while *Perko* presented “difficult problems of definition of status and coercion \* \* \* of a kind most wisely entrusted initially to the agency charged with day to day administration of the Act as a whole.” (App. H - p. 59a)

We are not here concerned with union action and employment discrimination. The primary concern is union conduct vis-a-vis a member and the union.

The Taft-Hartley Act is intended to promote commerce by attempting to insure industrial peace between employers and labor while protecting collective bargaining. It is not its purpose to regulate internal union matters (29 U.S.C.A. § 151) and in *Gonzales and Garmon* this court recognized that federal legislation has not pre-empted the field of controversy that exists between a member and his union arising from his rights predicated upon his status as a union member. Only when the exercise of state power over a particular area of activity threatens interference with the clearly indicated policy of industrial relations is it judicially necessary to preclude the states from acting.

“\* \* \* However, due regard for the presup-

positions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 78 S. Ct. 923, 2 L.Ed. 2d 1018. \* \* \*” (*San Diego Building Trades Council vs. Garmon*, *supra*)

Thus, we have here a situation where the union member was suspended from membership on the *sole ground* of nonpayment of dues. That this activity resulted in loss of employment is of mere peripheral concern to the Taft-Hartley Act. The subject of the action was the breach of a contract governing the relations between Respondent and his union.

This court has continued to recognize Congressionally carved exceptions to the pre-emption doctrine as well as refusing to hold state remedies pre-empted where the activity regulated was a mere peripheral concern of the Taft-Hartley Act (*Vaca v. Sipes*, 386 U.S. 171).

**III. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF THE OREGON SUPREME COURT.**

Following refusal of the National Labor Relations

Board to issue a complaint on the petition of Elmer Day (App. H - p. 46a), Elmer Day filed suit in the Oregon state courts and was awarded a judgment which was reversed on appeal. It clearly appears however, from the reported decision (*Day vs. Northwest Division* 1055, 389 Pac. 2d 42), that Elmer Day was able to prove, that to him at least, there was something more than a suspension for mere failure to pay dues and there was a specific finding of discrimination on the part of the union. As recognized by the Idaho Supreme Court (App. H - p. 59a) a finding of an unfair labor practice under such circumstances could well be established but in the instant case there was no such proof, no such conclusion and the finding by the Idaho trial court that the *sole* cause of suspension was failure to tender periodic dues is amply supported by the evidence.

“\* \* \* this case has been submitted and tried on the interpretation of the contract, not on a theory of discrimination.” (App. H - p. 59a)

#### **IV. IF THE STATE COURT HAS NO JURISDICTION, RESPONDENT HAS NO REMEDY IN ANY FORUM.**

The Idaho Supreme Court emphasizes that if it did not assert jurisdiction in this case Respondent would never again regain his union membership. (App. H - p. 58a) The N.L.R.B. found no federal violation upon the petition of Elmer Day. (App. H - p. 46a) A charge was placed before the Board

and the Board refused to proceed. If the Board did not refuse to issue a complaint because it felt the union's act did not violate the law (i.e., suspension was for nonpayment of dues) then it must have refused to proceed on the basis that the union activity did not have a sufficiently substantial effect on commerce to warrant the exercise of the Board's jurisdiction or was not even "arguably" protected or prohibited activity.

This court has held that certain state actions (not involving suspension for failure to pay dues) were untenable since the acts complained of might "arguably" be prohibited or protected under the Act and this determination should be made for the Board. However, where a charge has been placed before the Board and the Board refuses to proceed, this should dispose of any question as to what the Board might do.

True, Respondent did not file a charge with the N.L.R.B. but Day did, complaining that he had been suspended on the grounds of failure to pay dues when in fact he was not so in arrears in his dues as to warrant such suspension. It is abundantly clear that had Respondent proceeded before the Board as did Day, his charge would have been similarly rejected. This being the case, without a right to proceed in the state court, Respondent would be denied his membership in the union with no remedy.

whatsoever for the restoration of that important right. In the eyes of the law and the embracing arms of justice, such a result cannot be countenanced.

#### CONCLUSION

Since the acts of the union in suspending Respondent from membership were predicated on the *sole ground* of nonpayment of dues, they do not constitute a violation of the Taft-Hartley Act. The conduct in the instant case involves internal union matters; a breach of contract governing the relations between Respondent and his union. The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

No. ~~2000~~ **76**

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
an International Labor Union; and NORTHWEST  
DIVISION 1055 of the AMALGAMATED ASSOCIATION  
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, a Regional Division of the  
International Union, *Petitioners,*

v.

WILSON P. LOCKMAGE, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court  
of the State of Idaho

**REPLY BRIEF FOR PETITIONERS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

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No. 1072

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners*,

v.

WILSON P. LOCKRIDGE, *Respondent*.

---

On Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho

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**REPLY BRIEF FOR PETITIONERS**

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Only a few days ago, this Court again reiterated the fundamental principle which governs this case, that "the jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities which are 'arguably subject' to regulation under § 7 or § 8 of the Act. *San Diego Building Trades Council*

*v. Garmon*, 359 U.S. 236, 245 (1959).” *Longshoremen v. Ariadne Shipping Co., Ltd.*, No. 231, O.T., 1969, 38 L. Wk. 4207, 4208-4209, decided March 9, 1970. The Idaho Supreme Court in this case refused to bow to this principle even though it held that Petitioners “did most certainly violate 8(b)(1)(A), did most certainly violate 8(b)(2) (i.e., see *Krambo Food Stores, Inc.*, 114 N.L.R.B. 241 (1955)) and probably caused the employer to violate 8(a)(3), all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the National Labor Relations Board . . .” (Pet. 51a (footnote omitted)). Respondent evidently recognizes that any such violation does most certainly render his claim pre-empted by Board jurisdiction by virtue of the Act. Accordingly, he asserts he cannot “discern any violation of Section 8(a)(3) or 8(b)(1)(A) [or 8(b)(2)]” (Opp. 10). Respondent’s inabilities in this respect are self-imposed. He cites no authority and engages in no discussion of the law. His Brief in Opposition (“Opp.”) does not even attempt any genuine reply to the authorities and reasoning set forth in the Petition demonstrating that this particular Union conduct is so regulated in the Act as to be certainly either protected under § 7 or proscribed under § 8.

Respondent tenders no reply, for example, to the analysis in the Petition demonstrating that under the Act a Union may not take any action adverse to the employment status of one of its members on the ground that he is in arrears in his dues, unless he is found to be genuinely in arrears under a valid union-security agreement. Accordingly, the very fact that Petitioners proceeded against Respondent on “the *sole ground*” that they believed him in arrears in his Union dues (Opp. 3, 6, 7, 11, 13, 14, 16 (emphasis in original)),

far from removing the case from the Act as Respondent would like, inescapably invokes the Act. Indeed, it virtually echoes the very language of § 8(b)(2) making it an unfair labor practice for a Union "to discriminate against an employee with respect to whom membership in such [labor] organization has been denied or terminated on some ground other than his failure to tender the periodic dues . . . uniformly required as a condition of . . . retaining membership" (Pet. 81a).<sup>1</sup> Respondent musters no reply to the demonstration in the Petition that the State Courts transparently violated the pre-emption principle in this case by adjudicating the very issues which the Board routinely decides in §§ 8(b)(1)(A)-8(b)(2) cases, whether the suspension from Union membership and employment was actually in fact and validly in law for failure timely to tender the dues, or—the only other possible alternative—was for some *other* reason. In all these §§ 8(b)(1)(A)-8(b)(2) cases, the Board is dealing with alleged "arbitrariness and misconduct vis-a-vis the individual member and the union" (Opp. 7). It was precisely such arbitrariness and misconduct which the Congress regulated in the Act by establishing a national policy with respect to union-security clauses.

While Respondent attempts to urge that the employment relationship is not involved, his own recital of the facts, like that of the Court below, demon-

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<sup>1</sup> If the Board determines that an employee has been "denied employment to which he was otherwise entitled for no reason other than his tardy payment of union dues" because of the application of a Union "rule apparently aimed at encouraging prompt payment of dues" and the union-security clause may not be validly applied in the premises, the Union commits an unfair labor practice under the Act. *Radio Officers v. Labor Board*, 347 U.S. 17, 42 (1954); and cases cited at Pet. 16-19.

strates the inextricable involvement of the employment relationship. Indeed, Respondent's very first sentence recites the fact that he was employed by the Greyhound; and Respondent goes on to refer, as he must under the realities of this case, to the provisions of the union-security clause in the collective bargaining agreement with Greyhound and to the central fact that he lost his employment (Opp. 2-3).

In *Borden* and *Perko*, like this case, the claim was that the Union had taken discriminatory action against the plaintiff because the Union believed its own internal rules had been violated; and because §§ 8(b)(1) (A) and 8(b)(2) might arguably have been violated, this Court reversed State Court judgments for plaintiff upon the ground of pre-emption. This case is blanketed by *Borden* and *Perko*. The fact that membership and dues delinquency were involved in this case, if it is a cognizable difference from *Borden* and *Perko* (Opp. 11-13), makes this case an even more obvious case of pre-emption by Federal law. For this case involves Union conduct not only embraceable under the rubric of "discrimination" but, in addition, regulated in the Act expressly.

Although the Court below acknowledged the conflict between its judgment and that of the Oregon Supreme Court in *Day*, Respondent contends there is no such conflict (Opp. 13-14). This contention appears only in the Argument portion of Respondent's Brief in Opposition; the Statement of the Case portion recognizes the parallelism between the two cases (Opp. 3). The difference Respondent discerns for the sake of his argument is that there was a specific finding of discrimination by the Union in *Day*, whereas there is none in this case. Respondent's assertion about *Day* is not

supported by any citation to that case; and his assertion about this case is in the teeth of the pertinent findings and conclusions of the Idaho District Court.<sup>2</sup>

The Opposition acknowledges that it was "obvious that Respondent would obtain no relief through the National Labor Relations Board" because his charge would receive the identical treatment as Day's which was rejected by the Board "on the ground that there was insufficient evidence of violation of the National Labor Relations Act" (Opp. 4).<sup>3</sup> Unwittingly, Respondent thus concedes the actual, and *a fortiori*, the potential, conflict between State and Federal law which the pre-emption principle is designed to avoid. If Respondent had no claim against Petitioners under the Federal law, as Petitioners submit and Respondent

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<sup>2</sup> The District Court found, as a matter of fact, that "it has over the years been customary within Division 1055 for members to be in arrears in their dues without being suspended, even though said arrearages exceeded 60 days" (Pet. 35a). Further, it concluded, as a matter of law, that "in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and *contrary to all custom within Division 1055*, defendants, whose officers and agents acted in concert, violated said contract" (Pet. 40a (emphasis added)). Likewise, in its Memorandum Decision, the District Court stated that the union "wished to punish the plaintiff for refusing to go along with the check-off" (Pet. 28a). Finally, in ruling on the Motions to Amend the Findings of Fact, Conclusions of Law and Judgment, the District Court concluded that "overall the record does support a finding that the union had in the past been tolerant of late dues payment" (Pet. 30a). Such distinctive treatment of an individual member surely is "discrimination" under the Act.

<sup>3</sup> Manifestly, Respondent had "an effective mechanism whereby [he] could obtain a determination from the National Labor Relations Board" as to whether the Union conduct of which he was complaining was protected or unprotected. *Longshoremen v. Ariadne Shipping Co., Ltd.*, *supra*, at 4209 (concurring opinion).



concedes is the case, the only proper result under the Supremacy Clause is that Respondent should indeed have no remedy in any forum (Opp. 14-16).

The critical issue is not whether Petitioners' conduct was legal or illegal, but in what forum and by what law shall that question be decided: Shall it be the State Courts enforcing State procedures, State substantive law and State labor policy; or shall it be the National Labor Relations Board enforcing national procedures, national substantive law and national labor policy as determined by Congress in the Act? The Supremacy Clause and the pre-emption decisions of this Court dictate that the State law is pre-empted and the Federal law paramount.

### CONCLUSION

For the reasons stated herein and in the Petition, this Petition should be granted and the judgment and decision below summarily reversed.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

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No. 1072

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners*,

v.

WILSON P. LOCKRIDGE, *Respondent*.

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On a Writ of Certiorari to the Supreme Court of the  
State of Idaho

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**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The most recent opinion of the Supreme Court of the State of Idaho is reported at 93 Idaho 294, 460 P.2d 719 (1969), and is set out at A. 89. Its earlier opinion, reversing and remanding for trial, is reported at 84 Idaho 201, 369 P.2d 1006 (1962) and is set out at A. 27.

The Memorandum Decisions of the Idaho District Court are not reported. The following are printed

in the Appendix: April 7, 1961, granting the Motion to Dismiss on pre-emption grounds (A. 22); December 21, 1962, striking defendants' defense on the merits and holding that the provisions of the dues delinquency clause of the International Union Constitution and the union-security clause of the collective bargaining agreement were unambiguous (A. 36); June 21, 1966, on the merits after trial (A. 49); and September 1, 1966, on the Motions to Amend the Findings of Fact and Conclusions of Law (A. 54). The District Court's Findings of Fact and Conclusions of Law, as amended, of September 1, 1966, are set out at A. 56.

### **JURISDICTION**

The judgment and decision of the Supreme Court of the State of Idaho was entered on October 15, 1969. A petition for a writ of certiorari to the Supreme Court of Idaho was filed in this Court on January 13, 1970. This Court granted the petition on March 30, 1970. 397 U.S. 1006. This Court has jurisdiction to review the judgment herein by a writ of certiorari pursuant to 28 U.S.C. § 1257(3).

### **CONSTITUTION AND STATUTORY PROVISIONS INVOLVED**

The pertinent portions of the Supremacy Clause of the United States Constitution—Article VI, Section 2—and of the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.* ("Act")—Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 157, 158(a)(3), 158(b)(1)(A), 158(b)(2)—are set out in the Statutory Appendix to this Brief, p. 1a, *infra*. The relevant statutory provisions are also set out at pp. 28-30, *infra*.

### QUESTION PRESENTED

Can a State Court assert jurisdiction over union conduct which is so regulated by the Congress under the National Labor Relations Act as to be certainly either protected activity or an unfair labor practice—causing an employee's discharge pursuant to a union-security clause in a collective bargaining agreement, by advising the employer that the employee was no longer a member of the union in good standing because he had failed to tender timely the periodic dues uniformly required as a condition of retaining union membership?

### STATEMENT OF THE CASE

#### The Union Conduct

On or about May 16, 1943, Respondent Lockridge, a citizen of Idaho, was employed as a bus driver by the Greyhound Corporation, Western Greyhound Lines or one of its predecessors ("Greyhound"). Throughout the period of his employment, the terms and conditions of that employment were governed by collective bargaining agreements between Greyhound and Petitioner Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("Union").<sup>1</sup> These collective bargaining agreements included a union-security provision requiring all employees to remain members of the Union as a condition of employment. Additionally, they contained a check-off clause which permitted the employees to have their Union dues deducted from their compensation by Greyhound. Lockridge maintained this authorization and via the check-

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<sup>1</sup> The other Petitioner, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, is referred to herein as "International Union".

off maintained the Union membership condition of his employment, until 1959.

On or about August 11, 1959, however, Lockridge terminated his check-off authorization (A. 75, 80), thereby undertaking to maintain his Union membership in good standing on his own initiative so as to retain his employment. Lockridge was aware he had this responsibility. A. 76. On August 20, 1959, the Union requested that he reinstate his check-off authorization, specifically pointing out that the International Union Constitution provided in pertinent part, "[w]here agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears *one month* may be suspended from membership and removed from employment, in compliance with terms of the agreement." A. 79.<sup>2</sup> This Union letter concluded, "In the event you do not maintain your membership in Division 1055 as specified above, we will be required to have you dismissed from service with Greyhound." A. 80.

Nevertheless, Respondent Lockridge elected not to restore his dues check-off authorization; and he promptly permitted himself to become in arrears in his dues payments. As a consequence of his revocation of his check-off authorization, Greyhound had returned to him, and the Union had returned to Greyhound, the amount which had been checked off for his September, 1959 dues (A. 75, 80-81); and he neglected to pay the dues for that month by October 1, 1959, thereby becoming in arrears. Prior to November 1, 1959, the Union notified Lockridge that he was required to pay his September and October dues by

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<sup>2</sup> Emphasis added. Emphasis is added and footnotes are omitted in quotations throughout this Brief, unless otherwise specified.

November 1, 1959, or he would be considered in arrears and thus subject to dismissal. A. 73, 80-81.

Despite this notice, Lockridge did not bring his dues payments up to date by November 1, 1959. He failed to pay his October dues by that date. Thereby, in Petitioners' view, he became delinquent in his Union dues payment and surrendered his membership in the Union and, accordingly, rendered himself liable to discharge from his employment. Consequently, the Union requested Greyhound to discharge him because he was no longer a member of the Union as the collective bargaining agreement required. A. 82. Pursuant to this Union request, Greyhound discharged him, on or about November 3, 1959. A. 86.

At the same time and for the identical reason, the Union caused Greyhound to discharge another one of its bus drivers, Elmer J. Day, a citizen of Oregon. See pp. 55-58, *infra*. Day's case was before this Court in No. 301, O.T. 1964, *Elmer J. Day, Petitioner v. Northwest Division 1055, etc., et al., Respondents*. The Supreme Court of Oregon had reversed the trial court's award of substantial damages, relying for this holding upon the pre-emption decisions of this Court (238 Ore. 624, 389 P.2d 42 (1964)), and this Court denied certiorari (379 U.S. 878 (1964)).

Both Day and Lockridge felt that the Union had unlawfully procured their discharge from their employment as Greyhound bus drivers; they took the position that they had maintained their Union membership by timely dues payments. The first action against the Union was a Charge filed by Day with the National Labor Relations Board, alleging that the Union had violated §§ 8(b)(1) and (2) of the Act in procuring his discharge. After investigation, the

Regional Director of the Board dismissed the Charge because there was "insufficient evidence of violations \* \* \*." A. 14. Thereafter, Day brought his suit in the Oregon Courts.

Lockridge never made any application to the Board or contacted it in any way. A. 76. The only explanation he could give for this failure was that he had "heard" that the Board did not have jurisdiction, he could not recall from whom, about a week after he was removed from employment. *Ibid.*

#### **Inception of Suit and Successive Complaints**

Rather than submit himself to the Federal forum, Respondent Lockridge filed suit in the Idaho State District Court at Boise, in September, 1960, against the Union and the International Union, which are the Petitioners herein, and also the Greyhound Corporation. The basic allegation, which remained throughout the litigation,<sup>3</sup> was that Petitioner Unions "have deprived [him] of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience \* \* \*." A. 7, 18, 47.

The original Complaint (A. 4-11) had four Counts. Count One was the basic one sounding in the tort of unlawful interference with employment; damages and punitive damages were sought on this Count against all defendants including the Company. Count Two sought the identical damages from the Unions only

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<sup>3</sup> In addition to the original Complaint, Lockridge filed an Amended Complaint on February 15, 1961 (A. 14), and a Second Amended Complaint (A. 43), upon which trial was had, on March 31, 1965.



and alleged a violation of the Union rules in the procurement of Lockridge's discharge. Count Three, likewise directed only against the Unions, sounded in conspiracy, in essence "that as a result of differences arising through the internal management of the International Association and Division 1055, officers of the International Association and officers and agents of Division 1055 desired to punish the plaintiff and make an example of him and deter other members of the union from asserting their true and lawful rights under the constitution and general laws of the International Association and for the purpose of coercing and intimidating other members of the union conspired, determined and agreed to make example of the plaintiff by seeking and obtaining his discharge from employment [and] thereby discriminated against plaintiff as a member of the union." A. 9. Count Four alleged that Greyhound had been negligent in simply accepting and not investigating the Union's notice that Respondent Lockridge was delinquent and in discharging him.

The only specified relief Lockridge prayed for was money damages. He sought \$212,200 in actual damages, and persisted in this throughout the litigation. A. 11, 22, 48. In addition, he sought \$50,000 in punitive damages, but this was dropped in the Second Amended Complaint. A. 48. The amount of actual damages was computed on the theory that Lockridge was entitled to recover a lifetime income because his discharge at Union request had rendered him permanently unemployable. This theory is reflected in the following paragraph of the Complaint (A. 7) which remained in both Amended Complaints (A. 18, 46):

"That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of

age, earning in his employment an average of approximately \$7,200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future for the next 20 years and until he became 65 years of age, in excess of \$7,200.00 per year, and additionally, at the age of 65 years would have been able to retire with retirement pay of approximately \$3,600.00 per year."

After the filing of motions to dismiss based upon pre-emption, but prior to the decision on those motions, Lockridge filed an Amended Complaint which dropped Greyhound as a party defendant. This First Amended Complaint (A. 14-22) included the first three Counts of the original Complaint, now demanding recovery only from the Unions: Count One, the tort of unlawful interference with Lockridge's employment; Count Two, violation of the "contract" between the member and the Union; and Count Three, conspiracy and malicious action.

Subsequent to the first Idaho Supreme Court decision and prior to trial, Lockridge filed a Second Amended Complaint (A. 43-48) which excised Count Three and the prayer for punitive damages.

In his Amended Complaints, Lockridge alleged that the Unions had deprived him of his employment wrongfully in that he "was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of [the Union officer] aforesaid [in advising Greyhound he was delinquent thus causing his discharge] were wrongful and without any lawful basis." A. 17, 46.

While avoiding the use of the words "to discriminate" and "not uniformly required" which appear on

the face of Section 8(b)(2) of the Act, 29 U.S.C. § 158(b)(2), quoted pp. 1a, 28, *infra*, Lockridge in both Amended Complaints alleged that "it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof" and that the Union had acted against him "in a manner never before indulged in." A. 18, 46-47.

**District Court Dismissal, Idaho Supreme Court Reversal  
on Pre-Emption**

Throughout the case, the principal contention of the Petitioner Unions was that the subject matter of Lockridge's action was pre-empted by the Act and that the State Court was thereby deprived of jurisdiction. This issue was raised at the outset by a motion to dismiss alleging the Union conduct complained of was subject to exclusive Board jurisdiction under the Act. A. 12. Relying primarily upon *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), the Idaho District Court granted the motion and dismissed on this Federal ground. A. 22. The nub of the Court's conclusion was that "plaintiff is asserting an unlawful labor practice, because he is seeking damages based upon *injuries to his employment*, as distinguished from damages based upon *injury to his rights as a union member*." A. 25 (emphasis in original).

The Supreme Court of Idaho reversed and remanded for further proceedings, however, asserting that the Federal law was in an "unsettled state" and therefore "[w]e must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' nor 'pre-

empted' by federal law, or, more appropriately, by the National Labor Relations Board." A. 34.<sup>4</sup>

That decision discussed and purported to be confused by this Court's decisions, *Machinists v. Gonzales*, 356 U.S. 617 (1958) ("*Gonzales*"), and *San Diego Unions v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*"). It was rendered before *Plumbers' Union v. Borden*, 373 U.S. 690 (1963) ("*Borden*") and *Iron Workers v. Perko*, 373 U.S. 701 (1963) ("*Perko*"). Indeed, the Court below, for support of its 1962 judgment, *inter alia*, relied upon *United Association of Journeymen, etc. v. Borden*, 160 Tex. 203, 328 S.W.2d 739 (1959) and *Perko v. Local No. 207 of Int. Ass'n of Bridge, etc., Workers*, 171 Ohio St. 68, 167 N.E.2d 903 (1960) (A. 35), which were, of course, reversed by this Court in *Borden* and *Perko*.<sup>5</sup>

#### Subsequent District Court Proceedings

After the decision by the Idaho Supreme Court, Respondent Lockridge maintained his First Amended Complaint, again electing to seek damages only and

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<sup>4</sup> A petition for certiorari was not filed after the 1962 decision. Cf. *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952); *Construction Laborers v. Curry*, 371 U.S. 542 (1963), which was subsequent to this Idaho Supreme Court decision.

<sup>5</sup> Prior to the trial, Petitioners filed a Motion to Dismiss, based upon *Borden* and *Perko*, which had been decided subsequent to the 1962 decision of the Court below. When the District Court denied the Motion, Petitioners moved the Supreme Court of Idaho for a writ of mandate to compel the District Court to dismiss the action on the ground that it lacked jurisdiction, in the light of *Borden* and *Perko*. In October, 1963, that Court "denied petitioners' petition for writ of mandate on the ground that the question is prematurely presented and petitioners have an adequate remedy by appeal, therefore, mandate is not available." Idaho Supreme Court No. 9393, Order of October 1, 1963. Accordingly, the issue was preserved and presented by way of appeal.

not to request restoration to Union membership; and Petitioners answered on the merits. They asserted, *inter alia*, that Lockridge had failed and refused to pay his dues as required by the Union Constitution, and was consequently discharged in accordance with the collective bargaining agreement. Lockridge moved to strike this defense, and the District Court granted the motion, asserting "that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends." A. 36.<sup>6</sup>

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<sup>6</sup> Although it is not clear on the face of the District Court Memorandum Decision, the basis for this holding is no more and no less than the differences in wording between "member in good [financial] standing" and "member." The pertinent provision of the Union Constitution, Section 91 (quoted in the opinion below, A. 92), provides that members are not delinquent in dues until they are in arrears over two months, except that "[w]here agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement." The collective bargaining agreement applicable to Respondent provided that employees "shall remain *members* as a condition precedent to continued employment." According to the State Courts, Petitioners' conduct was unlawful because the International Union Constitution provided for one rather than two months arrearages only where the collective bargaining agreement required that employees must be "members \* \* \* in continuous good financial standing," whereas this agreement provided only that they must be "members"; it did not use the entire phrase from the International Union Constitution, nor did it use a phrase such as "member in good standing." A. 50-51, 60, 64, 92.

In fact, the collective bargaining agreement applicable to Respondent was one of a series of different contracts, applicable respectively to the different groups of employees who had been acquired at various different times by Greyhound. In all of these but the one agreement, the union-security clause read, "shall, as

Subsequently, Petitioners sought leave to file Amended Answers, and accompanying Affidavits, to demonstrate that the consistent practice of the parties and their consistent interpretation of the pertinent collective bargaining agreement and International Union Constitution provisions did establish that Respondent was delinquent and therefore properly discharged from employment. A. 37-42. But the District Court denied leave upon the basis of its previous holding that there was no ambiguity. While persisting in the view that they acted lawfully and completely in accord with the pertinent collective bargaining agreement and Constitutional provisions, and that the Board would therefore have brought no complaint against them had Lockridge submitted his claim to it, Petitioners thereafter did not challenge this ruling.

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a condition of continued employment, maintain such membership *in good standing*." The thrust of the affidavits proffered by Petitioners from representatives of both the Union and Greyhound was that this difference in contractual language was inadvertent and was not ever intended or applied to produce any differences in practical results, under either the International Union Constitution or the administration and application of these agreements. A. 37-42.

As a matter of law, there is no difference between requiring "membership" and requiring "membership in good faith" for under the Act the member's only obligation in any event is to tender the periodic dues uniformly required as a condition of retaining membership. "As established in the *Radio Officers* case [*Radio Officers v. Labor Board*, 347 U.S. 17 (1954)], the 'membership' referred to in § 8(a)(3) and thus incorporated in § 8(b)(2) is broad enough to embrace participation in Union activities and maintenance of good standing as well as mere adhesion to a labor organization. 347 U.S. at 39-42." *Plumbers' Union v. Borden*, 373 U.S. 690, 695 (1963).

After a trial which was devoted almost entirely to the issue of damages,<sup>7</sup> but at which Petitioners renewed their motions based on pre-emption, the District Court issued a Memorandum Decision (A. 49) and also preliminary Findings of Fact and Conclusions of Law which were amended and finalized after the parties had requested various amendments, and the Court had issued another Decision thereon. In its basic Memorandum Decision, the District Court made clear it still believed that the case was pre-empted, and that *Borden* and *Perko* had "greatly reinforced" Petitioners' position (A. 52); and, further, that the Board plainly had jurisdiction over Lockridge's claim and that he was "partially at fault for his predicament because he did not pursue" the Board remedies available to him under the Act. A. 53-54. Nevertheless, the District Court regarded itself constrained to proceed because of the initial decision of the Idaho Supreme Court. A. 52. The District Court found that Petitioners had treated Respondent as a dues delinquent under circumstances when it would have regarded others as good standing members (A. 60-61, 64-65); that they had caused Respondent's discharge by advising Greyhound of his

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<sup>7</sup> In accordance with his theory that he was entitled to a lifetime of earnings as damages, plaintiff, as part of his case, offered and obtained a stipulation that "the Court may take judicial notice of the mortality tables in volume III of the [Idaho] Code, to use if necessary in this case for projecting Mr. Lockridge's life expectancy[.]" Court Reporter's Transcript, page 227, lines 15-19; stipulation made and received by the District Court, *id.* at lines 26-27. One of the District Court's Findings was that "[p]laintiff's life expectancy at time of trial is approximately 23 years." A. 63.



dues delinquency and had thus damaged him;<sup>8</sup> and it awarded damages of approximately \$32,000, measured primarily by the earnings of the driver who stood just below Lockridge on the Greyhound job seniority roster at the time of Lockridge's discharge. A. 62, 66.

Further, while recognizing that "plaintiff did not seek such a remedy" the District Court awarded him "full restoration" of Union membership. A. 66. In his motions addressed to the preliminary Findings and Conclusions, Lockridge requested the District Court to direct that this restoration should be with full seniority. Astonishingly, Lockridge sought this relief from the State Court on the ground that it was routinely provided in such cases by the Board. A. 55. The District Court denied this request precisely on the ground that "seniority" involved the *employment* relationship. It held that granting any such relief would "clearly be in excess of [the State Court's] jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the 'Borden' and 'Perko' decisions." *Ibid.*

#### Decision Below

Petitioners' appeal to the Supreme Court of Idaho, based solely on pre-emption, was rejected in a 4-1 vote.

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<sup>8</sup> The pertinent Conclusion of Law was "That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and *resulted in a wrongful interference with plaintiff's employment, occupation and livelihood* and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish." A. 66.

On Lockridge's cross-appeal, the Idaho Supreme Court added to his damages and directed he be restored with full seniority. As the majority and dissenting opinions demonstrate (A. 89, 111), the Court below was divided on whether the pre-emption principles declared by this Court, particularly in *Garmon*, *Borden* and *Perko*, deprived it of jurisdiction. The dissenting Judge sought to honor those decisions enforcing pre-emption principles; but the majority upheld Idaho State Court jurisdiction, even though (1) it paid lip service to the pre-emption principle established by this Court that the State Courts lacked jurisdiction over union conduct which was even "arguably" an unfair labor practice (A. 102-105); and (2) it held that the Union conduct involved was "most certainly" an unfair labor practice subject to the jurisdiction of the Board under the Act. A. 98.<sup>9</sup> In essence, the majority held, and the dissent denied, that this case could be insulated from the pre-emption decisions of this Court because it involved only Lockridge's Union membership and did *not* sufficiently involve his employment relationship. The opinions of the Court below are discussed at pp. 46-51, *infra*.

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<sup>9</sup> This was in the early part of the opinion, in the context of summarizing the Unions' position. In the later context of its holding that the membership and not the employment relationship was centrally involved, the Court's words were, "there may have been violations of the Act \* \* \*" (A. 100). Later in its opinion, in discussing the *Day* case, the Court below actually indicated there was no such unfair labor practice in this case as there was in *Day*. A. 106; see pp. 49-50, *infra*.

**SUMMARY OF ARGUMENT****I.****The State Court Jurisdiction Is Pre-Empted Under the  
"Arguably" Protected or Prohibited Standard**

The State Court had no jurisdiction to regulate this Union conduct, since: (A) the Union conduct involved in this case, procuring an employee's discharge under a union-security clause by advising the employer he has failed to tender the periodic dues uniformly required as a condition of retaining membership, is *certainly either protected or prohibited* under the Act; (B) this Court has clearly and consistently held that union conduct which is even *arguably* protected or prohibited under the Act is pre-empted; (C) this union conduct is routinely regulated by the Board; and (D) there is actual conflict between the regulation of this very Union conduct by the Board and by the Idaho Supreme Court.

A. 1. Respondent's employment relationship with Greyhound is the crux of this case. Respondent sued Greyhound and Petitioners originally, and persisted against Petitioners, only because his employment had been terminated. The critical union conduct involved in this case, the Union conduct which is bedrock to Respondent's claim for money damages, is the procurement of his discharge from Greyhound under the union-security clause in the collective bargaining agreement between Greyhound and the Union, by advising Greyhound he was delinquent in his dues. The question of whether he was delinquent under the internal Union rules is a subsidiary question; the ultimate issue is whether the Union obtained his discharge wrongfully.

All Respondent has ever wanted from this case is money, money principally as damages for loss of his Greyhound job. In the Complaint he filed and the case he made at trial, Respondent sought an amount of money derived from the fundamental theory of his case that he had become permanently unemployable, an amount which would have made his membership in the Union of Greyhound employees irrelevant. Restoration to Union membership was thus never sought by Respondent in his pleadings or at trial. He sought no relief in equity. On the actual record of the case, therefore, the crux of this case is the employment relationship rather than the union membership relationship. The union conduct involved in this case is interference with Lockridge's employment relationship by obtaining his discharge from Greyhound pursuant to the union-security clause, by advising Greyhound he had not timely tendered the periodic dues uniformly required as a condition of retaining membership in the Union.

2. This union conduct is certainly either protected or prohibited under the Act. Principally in § 8(b)(2) but in other provisions of the Act as well, Congress has expressly regulated the union conduct of procuring an employee's discharge under a union-security clause by advising the employer he has failed to tender the periodic dues uniformly required as a condition of retaining membership. By outlawing such conduct as a union unfair labor practice with the solitary exception of the case in which such a discharge is actually in fact and validly in law based upon a union-security clause in a collective bargaining agreement, Congress has blanketed *all* such discharges. All must necessarily be either protected or prohibited. There is no exception whatsoever. All such discharges are protected

only if they fall within the exception in the Act; otherwise, they are prohibited.

B. Under the pre-emption decisions of this Court, the State Courts have no jurisdiction to regulate conduct which is "arguably" either protected or prohibited activity under the Act. The potential conflict between the exercise of such State Court jurisdiction and the national labor policy as spelled out in the Act is too great, this Court has repeatedly and consistently held, to permit any exercise of State jurisdiction. This "arguably" touchstone was distilled by this Court in *Garmon* from the prior pre-emption cases. *Garmon* was intended to be a landmark case and indeed has been consistently followed and applied by this Court in subsequent cases.

Of those cases, the one closest to the instant one is *Borden*. In *Borden* and its companion case *Perko*, as in this case, the plaintiff was foreclosed from a particular job because the union believed he had violated an internal union rule. The plaintiff sued on claims identical to those involved in this case, tortious interference with employment rights and breach of the contract between the union and the member. The State trial courts overruled pleas of pre-emption in *Borden* and *Perko* and judgments for the plaintiff were affirmed by the State appellate courts. This Court reversed, however, on the basis of the *Garmon* rule. This Court held that under the allegations of plaintiff's complaint and the facts as found, the conduct was in violation of §§ 8(b)(1)(A) and 8(b)(2). Precisely the same analysis is clearly applicable to the instant case.

This Court went on to distinguish *Gonzales*, the case principally relied on by the Respondents in *Borden* and *Perko* as by the Respondent in this case, on the

ground that the crux of case was the employment relationship, whereas *Gonzales* had been involved with a purely internal union matter. In this case as in *Borden*, there was no specific equitable relief sought directed to Respondent's status in the Union. Accordingly, as there was no State remedy invoked there was no further remedy to "fill out"; and the State Court lacked jurisdiction.

*Perko*, a companion case to *Borden*, likewise involved a plaintiff who claimed the defendant union had interfered with his employment rights on the basis of applying a union rule, and had obtained a trial judgment against the union, which was affirmed on State appeal, despite the plea of pre-emption. As in *Borden*, this Court reversed the State judgment, distinguishing *Gonzales* and holding that the "arguably" rule of *Garmon* was indeed applicable under these circumstances.

In the *Day* case, the Oregon Supreme Court had before it precisely the conduct which is involved in this case; Elmer J. Day had been discharged by these Petitioners on the same date and for the identical Union dues delinquency as Respondent Lockridge. Unlike the Court below, however, the Oregon Supreme Court in *Day* followed *Garmon*, *Borden* and *Perko* and reversed a judgment for Day upon the basis of the pre-emption principles declared by this Court.

In order to reach its result favoring Respondent and to distinguish the decisions of this Court which were so plainly controlling, the majority opinion below was forced to adopt a sharply truncated view both of the actual record in this case and of the pre-emption decisions of this Court. Even beyond simply neglecting the plain fact that Respondent never requested restoration of Union membership or any other equitable relief,

the majority below blandly asserted that Respondent had been principally if not exclusively concerned throughout with restoration of Union membership. Moreover, the majority below presumed to distinguish *Garmon* because it involved picketing, which the majority characterized as a vital tool of labor and at the heart of the Act, whereas it declared the conduct involved in this case could not be so characterized. But this case involves the union-security clause, which is manifestly a vital tool of labor and one which Congress obviously regarded as at the heart of the Act, inasmuch as Congress comprehensively regulated such clauses in the Act.

*Borden* and *Perko* could be distinguished, the majority below asserted, because they did not involve membership rights but did involve a particular job. In truth, as the dissent pointed out, this case is identical to *Borden* and *Perko* in the State Court's reliance upon the contract between the union and the member; and this case obviously involves only one particular job, Lockridge's bus driving job with Greyhound. As the dissenting opinion made clear in its analysis of the development of the pre-emption principles by this Court, especially the landmark *Garmon* case and the definitive elucidations thereof in *Borden* and *Perko*, the true touchstone is whether the union conduct was at least arguably subject to the jurisdiction of the Board and to regulation under the Act. Under that touchstone, as the dissenting Judge held, this case was ended upon the majority's own recognition that the Union conduct at bar could certainly constitute an unfair labor practice under the Act. In a correct view of the law, the conclusion ineluctably follows that this case was pre-empted and there was no State Court jurisdiction over its subject matter.



C. The Union conduct involved in this case is the regular grist of the Labor Board mill in cases involving alleged violations of §§ 8(b)(2) and 8(b)(1)(A). In such cases, the discharged employee typically makes the identical claim presented by Respondent, that he did in fact and in law timely tender the periodic union dues payments uniformly required as a condition of retaining membership, and is therefore still a union member and in any event could not rightfully have been discharged. Conversely, in these Board cases, the unions invariably take the identical position Petitioners did in this case, that the individual who has lost his membership and his employment was actually delinquent in his dues payment, and was validly and legitimately discharged pursuant to the union-security clause in the collective bargaining agreement. In adjudicating such disputes in the multifarious §§ 8(b)(2)-8(b)(1)(A) cases coming before it, the Board necessarily and routinely takes evidence on and adjudicates the meaning and application of the internal union provisions and practices relating to dues and the provisions and practices under the union-security clause in the collective bargaining agreement, as well as all other issues pertinent to the ultimate conclusion of law as to whether or not the conduct was wrongful. In short, these plainly are the very issues of fact and of law which the State Courts presumed to regulate and adjudicate in this case. Manifestly, there could be no clearer example of potential conflict between State Court and Board than the subject matter of this case.

D. On the basis of an identical dues payment record, Petitioners sought and obtained the discharge of Elmer J. Day by Greyhound, at the same time and for the same union dues delinquency for which it sought the discharge of Wilson P. Lockridge. Day filed a Charge

with the Board. The Board dismissed his Charge on the ground that its investigation showed that no further proceedings were warranted. Necessarily, this reflected the administrative conclusion that dues delinquency had not been the cause of his discharge or that Day was in fact delinquent. In any event, the Board in effect found nothing wrongful about the self-same conduct by Petitioners upon which Respondent has recovered. Manifestly, there could be no clearer example of actual, and not only potential, conflict between State Court adjudication under State law and Board adjudication under the Act than this case.

## II.

### **The State Court Jurisdiction Is Pre-empted Under the Occupation of the Field Standard.**

A. Congress has occupied the field of discharges under a union-security clause by a union's claiming that the employee has failed to make timely tender of his union dues. For the reasons indicated above, this is clearly either protected or prohibited under the Act. There are no exceptions. There is no such case which lies outside of the field which Congress has regulated.

B. When Congress has occupied a field, it has foreclosed it to State regulation. In the labor field, this Court has enforced this Constitutional mandate with respect to peaceful strikes for higher wages. (*Automobile Workers v. O'Brien*, 339 U.S. 454 (1950); *Bus Employees v. Missouri*, 374 U.S. 74 (1963)), peaceful picketing (*Garner v. Teamsters Union*, 346 U.S. 485 (1953)), picketing specifically regulated by the Congress (*Teamsters Union v. Morton*, 377 U.S. 252 (1964)) and the right to bargain collectively (*Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Hill v.*

*Florida*, 325 U.S. 538 (1945)). The identical principle is controlling here. Consequently, the Idaho Courts had no basis for asserting jurisdiction compatible with the Supremacy Clause of the Constitution.

### ARGUMENT

**I. THE STATE COURT HAD NO JURISDICTION OVER THE UNION CONDUCT INVOLVED IN THIS CASE BECAUSE IT WAS CERTAINLY, AND A FORTIORI ARGUABLY, EITHER PROHIBITED OR PROTECTED UNDER THE ACT.**

**A. The Union Conduct in This Case Was Certainly Either Prohibited or Protected Under the Act.**

**1. The Union conduct in this case was the procurement of an employee's discharge under a union-security clause notifying the employer that he had not tendered the periodic dues uniformly required as a condition of retaining membership.**

Throughout this case, Respondent concerned himself exclusively with the Union conduct of procuring his discharge under a union-security clause by notifying his employer, Greyhound, that he had not tendered the periodic dues uniformly required as a condition of retaining his membership in the Union. Respondent's solitary objective at the litigation table at which he elected to take a chance has been to win substantial money damages measured principally by the loss of his Greyhound employment.

In the Complaints he filed, including the Second Amended Complaint which was his trial pleading, the critical allegations were addressed to the employment relationship. The "conduct set out in the complaint" is of prime importance in determining whether the Board has jurisdiction so that pre-emption applies. *Radio Union v. Broadcast Serv.*, 380 U.S. 255, 257 (1965). In his complaints, Respondent recited the length of his employment and the earnings and benefits

accruing to him from his employment, for example, for these were allegations essential to his theory of actual damages. He asserted that his employment relationship was governed by a collective bargaining agreement between Greyhound and the Union providing for Union membership as a condition of employment, for this was a necessary element in his action deriving from his employment relationship. He detailed the events culminating in his discharge, the Union's finding he had not timely paid his October, 1959 dues, its requesting Greyhound to discharge him solely on this ground and Greyhound's discharging him solely at the request of the Union, for this Union conduct was the Union conduct for which he was seeking a money recovery gauged by loss of employment. He charged that the Union had treated him in an unprecedented, unique way, for this was critical to the concept of discriminatory treatment which was an essential ingredient of his theory of the case. His pleadings were focused squarely and solely upon the employment relationship. As Lockridge himself alleged and understood it, the crux of this case was the employment relationship.

As the District Court held in its opinion sustaining the motion to dismiss in 1961, in his original Complaint, which included Greyhound as a defendant, "the plaintiff several times alleged that all of defendants' acts were for the purpose of seeking discriminatory discharge by his employer. The gravamen, it seems to me, of his present pleading is the same, in that he alleged that the defendant union wrongfully expelled him for alleged failure to pay dues; that as a result of his expulsion he lost his employment with Greyhound Corporation and to his damage. There is a clear inference that the union did this to make an

example of him and to cause him to lose his employment, rather than to collect dues." A. 24.

To establish his case that the Union had caused his loss of employment, Respondent was required to have the Court interpret and apply the collective bargaining agreement which established the terms and conditions of his employment at the time he was discharged. His position that the language of that agreement was unambiguous was accepted by the Idaho District Court. This position and this acceptance were indispensable to his victory in this litigation. To be sure, Respondent likewise had to contend, and the State Court hold, that the International Union Constitution provisions about dues were unambiguous. But even the portion of those provisions about which the parties were in dispute related to the employment relationship (pp. 11-12, n. 6, *supra*). And the fact remains, ineradicable from the case, that the employment relationship was centrally involved, regardless of whether or the extent to which the membership relationship was also involved.

Lockridge himself patently did not direct this case to the membership relationship. In none of his Complaints was any equitable relief requested. His objective was money only. Never did he request restoration of his membership in the Union.

Because of the Idaho District Court's ruling that the collective bargaining agreement union-security clause, and also the collective bargaining union-security proviso of the International Union Constitution, were unambiguous, the trial was primarily devoted to damages rather than liability. Respondent's proofs of damages were derived exclusively from the employment relationship. The leading wit-

ness was the Greyhound driver who stood just below Lockridge on the Greyhound seniority roster at the time of the latter's discharge. This testimony was the foundation of the District Court's holding on damages. Thus the trial, like the pleadings and preliminaries, was concerned primarily if not exclusively with the employment relationship. Again, Respondent made no request for restoration of Union membership at the trial or in his Trial Brief, just as he had made none in his pleadings. His single objective, after trial as before, was to get money for himself out of the Union, not to get himself back in to the Union-member relationship.

Restoration of Union membership was never involved in this case, so far as Respondent himself was concerned. Its first appearance in this case was when the District Court granted that relief on its own initiative, expressly recognizing that it had not been requested. Transparently, the District Court, which believed it had no jurisdiction but had nevertheless been mandated by its State Supreme Court to assert jurisdiction, was striving to put the best legal face it could on its predicament. But its *ex post facto* decree could not transform the pleadings, the proofs, or the fixed realities of the case. As the District Court itself recognized at the very same time, this case did indeed inseparably involve the employment relationship and, accordingly, the only possible result conformable to the pre-emption decisions of this Court was that the Idaho District Court could not adjudicate this case because it lacked jurisdiction.

Evidently likewise recognizing that upon the real record in this case the District Court could not legitimately assert jurisdiction, the Supreme Court of Idaho

simply disregarded the record and attempted to transform this case sheerly by *ipse dixit*. The record belies the Court's naked assertion that "[t]he complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*," A. 99 (emphasis in original), an assertion which is fundamental to the basic predicate of the Court's entire majority opinion, that membership was the exclusive or principal purpose and nature of Lockridge's litigation, rather than money damages for loss of employment. Moreover, in view of the Complaints and the District Court opinions as they actually read, it required a temerity bordering on cynical or contemptuous consideration of and reaction against the pre-emption decisions of this Court for the Court below to incant in the inscription on the caption of the opinion below that this case is an "[a]ction by a former member of a labor union against the union for reinstatement to membership and for damages resulting from an improper discharge from membership." A. 89. The very phraseology, "discharge from membership," is patently contrived. Certainly, in common usage and particularly in this case, a "discharge" is from "employment" and the "damages resulting from an improper discharge" are a function of loss of employment compensation.

Not one word in the majority opinion below suggests that the Court knew or considered the fact that Respondent had never himself sought reinstatement to Union membership, but, rather, had consistently and unmistakably sought only money damages attuned to loss of employment. The truth is hardly affected by the felt need of the Court below to avoid mentioning or recognizing its plain existence. The fact is that the focus of this case is fixed firmly on the employment



relationship. The Union conduct for which Lockridge sought and obtained the money he desired—the Union conduct involved in this case—is the procurement of his discharge by Greyhound by advising it he had failed to tender the periodic dues uniformly required as a condition of retaining Union membership.

**2. Such Union conduct is certainly either protected or prohibited under the Act.**

The Union conduct involved in this case, procuring the discharge of an employee subject to a union-security clause by advising the employer that he is delinquent in his Union dues payments, is certainly either protected or prohibited under the Act, by virtue of the many express references to such conduct. The principal statutory provision involved is § 8(b)(2), 29 U.S.C. § 158(b)(2), which in pertinent part reads as follows:

“It shall be an unfair labor practice for a labor organization or its agents—\* \* \* to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”

Subsection (a)(3), 29 U.S.C. § 158(a)(3), to which § 8(b)(2) thus makes reference, makes it an unfair labor practice for an employer:

“\* \* \* by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, \* \* \*: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization \* \* \* (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

The language of § 8(b)(2) thus embraces a particular subject—any discriminatory action against an employee for any reason other than his failure to pay uniformly required dues and initiation fees. It establishes two different unfair labor practices. The latter is more general. It covers *any* discrimination by a union against an employee with respect to whom membership has been denied on some ground *other* than his failure to tender the required dues.

The other facet of § 8(b)(2), set out in its initial language, embraces a union's attempting to cause an employer to discriminate against an employee in violation of § 8(a)(3) of the Act. Section 8(a)(3) in turn condemns any discrimination by an employer with regard to tenure of employment that encourages or discourages union membership (and a discharge based upon failure to pay dues certainly has an impact upon whether employees will seek or avoid union member-

ship), unless there is a valid union-security clause in effect, but provided that the employer does not have reasonable grounds for believing that the membership was denied for reasons other than the failure of the employee to tender the periodic dues.

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), defines a broader unfair labor practice. Its more general language would embrace the particular conduct defined in § 8(b)(2) and a wide variety of other and unrelated conduct as well. In other words, not all violations of § 8(b)(1)(A) would be violations of § 8(b)(2). But all violations of § 8(b)(2) would be violations of § 8(b)(1)(A).

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce \* \* \* employees in the exercise of the rights guaranteed in section [7]: *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein \* \* \*.*"

Section 7, 29 U.S.C. § 157, provides:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities *except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] of this title.*"

Pursuant to these provisions, Congress has imposed Federal regulation of *all* discharges under a union-

security clause caused by a union's asserting that the employee has failed to tender union dues. All such discharges are illegalized as unfair labor practices, with but a single exception. The discharge is legitimized only if it was in fact and in law in accord with a valid union-security clause.

Whenever the record shows that the employee has failed to tender his dues and he is actually and validly terminated for that reason under a union-security clause, the union conduct in obtaining the discharge is "protected" activity under § 7 of the Act, to the identical effect of any union action taken in observation and enforcement of a valid collective bargaining agreement. Whenever the record shows the employed is terminated for *any other* reason under a union-security clause, the union conduct involved is "prohibited" as an unfair labor practice under §§ 8(b)(2) and 8(b)(1)(A).

All cases must inevitably fall on one side or the other of the legal fence. Congress left no room for muggumps. In all these cases under the Act, the dominant question is whether the union conduct in obtaining the discharge was actually in fact and validly in law on the ground of delinquency in dues payments. Based on the findings as to that issue, the case falls to the "protected" or to the "prohibited" side. The statutory provisions reading in terms of all such-and-such cases and all *other* cases ineluctably blanket the entire area of discharges under a union-security clause based on alleged failure to tender dues.

That the Act means what it says in covering all such cases was declared most clearly and authoritatively in *Radio Officers v. Labor Board*, 347 U.S. 17 (1954), the

leading interpretation of § 8(b)(2); the following discussion is the most pertinent:

“Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The *only* limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if \* \* \* ‘membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.’ *Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination.* This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for *any* purpose *other* than to compel payment of union dues or fees. \* \* \* Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. *No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.*” *Id.* at 40-42.

Clearly, as a matter of establishing a properly balanced labor policy, after lengthy debates, Congress knowingly regulated all cases involving union conduct such as that at bar. There are no other possible categorizations of a union's procuring the discharge of an employee under a union-security clause by advising the employer he has failed to make timely tender and

has fallen into union dues delinquency. Such union conduct must perforce by the Congressional express prescriptions be certainly either protected or prohibited.

**B. State Courts Have No Jurisdiction Over Union Conduct Which Is Arguably Either Protected or Prohibited Under the Act.**

**1. This Court has firmly established and followed the "arguably" rule.**

There is no principle of Constitutional and labor law which this Court has set forth with greater clarity and consistency than the principle that State jurisdiction must yield where union conduct is even "arguably" subject to the jurisdiction of the Board, either as an activity which is protected, or an unfair labor practice which is prohibited, by Congress in the Act. This fundamental standard was clearly and definitively elucidated in *Garmon*, and has been consistently followed by this Court.

*Garmon* was plainly intended and recognized to be the Court's definitive statement of pre-emption principles. It established and explained the fundamental objective sought to be achieved in the prior pre-emption cases, and distilled from them the general rule which would determine future judicial decisions. The fundamental objective, the Court declared, was to eliminate "potential conflicts" which assertion of State jurisdiction might generate, "conflict with a complex and inter-related federal scheme of law, remedy, and administration." 359 U.S. at 242, 243.

To avoid such conflicts, "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the

method of regulation adopted. When the exercise of State power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id.* at 243. Accordingly, the general rule to govern judicial decision in the future was thus stated: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted." *Id.* at 245.<sup>10</sup>

The Court emphasized that this general rule applied whatever State substantive or procedural law was brought to bear upon the activity. "Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Id.* at 244. Similarly, the Court declared, "Even the

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<sup>10</sup> The Court reiterated this rule in somewhat different phraseology in at least two other passages in *Garmon*:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law." 359 U.S. at 244.

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"Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." *Id.* at 246.



States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Id.* at 247. The only exceptions to the rule were "where the activity regulated was merely peripheral concern of the Labor Management Relations Act"<sup>11</sup> and "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of power to act."<sup>12</sup> *Id.* at 243-244.

<sup>11</sup> The Court here cited *Gonzales*. The relationship between *Gonzales* and *Garmon* was clarified in *Borden* in terms which make it clear that this exception is not applicable to this case. See pp. 41-42, *infra*.

<sup>12</sup> At this point, the Court dropped a footnote citing *Automobile Workers v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *Auto Workers v. Wisconsin Board*, 351 U.S. 266 (1956); and *Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954). Subsequently, in the text of *Garmon*, this Court referred to these four cases as involving "conduct marked by violence and imminent threats to the public order" and held that "[s]tate jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, and the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Garmon*, 359 U.S. at 247; and see *id.* at 247-248. In this case, of course, there has been no violence or threats to the public order; the Union conduct involved has been utterly peaceful throughout.

Similarly, in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), the Court recognized "'an overriding state interest' in protecting its residents from malicious libels", *id.* at 61; it held that "the malicious publication of libelous statements does not in and of itself constitute an unfair labor practice", *id.* at 63, and was careful to delimit "the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage", *id.* at 64-65, and to declare "[w]e apply the malice test to effectu-

The *Garmon* standard has been consistently adhered to by this Court. Many decisions have reiterated and applied its "arguably" touchstone: e.g., *Longshoremen v. Ariadne Co.*, 397 U.S. 195 (1970); *Radio Union v. Broadcast Serv.*, 380 U.S. 255 (1965); *Hattiesburg Union v. Broome Co.*, 377 U.S. 126 (1964); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964); *Borden*, 373 U.S. 690 (1963); *Perko*, 373 U.S. 701 (1963); *Contruction Laborers v. Curry*, 371 U.S. 542 (1963); *Ex parte George*, 371 U.S. 72 (1962); *Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962); *DeVries v. Baumgartner's Electric Construction Co.*, 359 U.S. 498 (1959); *Plumbers' Union v. Door County*, 359 U.S. 354 (1959); see also, *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 375, 381, 383 n. 19, 385 (1969); *Linn v. Plant Guard Workers*, 383 U.S. 53, 59 (1966); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 187-188 (1965); *In Re Green*, 369 U.S. 689, 692-693 (1962).

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ate the statutory design with respect to pre-emption." *Id.* at 65. In this case, the District Court did not find malice and awarded no punitive damages, but, rather, found that the Union had acted against Lockridge because of its construction of the requirement of the Union laws and the collective bargaining agreement. A. 53, 66. Unlike the malicious libel not covered by the Act in *Linn*, the loss of membership involved in this case is certainly of "relevance to the Board's function" and the Board can award damages, impose penalties and give related relief where, as here, the Union procures a discharge under the union-security clause. 383 U.S. at 63. The exercise of State jurisdiction would very much "interfere with the Board's jurisdiction over the merits of the labor controversy." *Id.* at 64.

Finally, inasmuch as the Board clearly had jurisdiction over this matter arising in the Greyhound bus driving employment which is obviously in interstate commerce, and the Board in fact took jurisdiction in the *Day* case and investigated Day's Charge (A. 14), this is at the polar extreme from a case in which there clearly is no Board jurisdiction. Cf. *Hanna Mining v. Marine Engineers*, 382 U.S. 181 (1965); *Ingres S.S. Company v. Maritime Workers*, 372 U.S. 24 (1963); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).

Only a few months ago this Court reaffirmed the *Garmon* principles. In holding that State jurisdiction was pre-empted, the Court reiterated yet again, "[t]he jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities which are 'arguably subject' to regulation under § 7 or § 8 of the Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)." *Longshoremen v. Ariadne Co.*, *supra*, at 200.

## 2. The "arguably" rule governs this case.

a. *Borden*, *Perko* and *Day* demonstrate that the "arguably" rule governs this case.

*Plumbers' Union v. Borden*, 373 U.S. 690 (1963)

*Borden* is the pre-emption decision of this Court which most clearly governs this case. The legal issues presented are identical in the two cases. The Court below recognized this in 1962 in citing the Texas State Court decision in support of its assertion of jurisdiction, albeit it currently purports to distinguish this Court's reversal of that Texas decision. Identically in both *Borden* and this case, plaintiff asserted that the union had acted wrongfully against him, tortiously interfering with his employment rights and breaching the contract of the union rules between himself and the Union;<sup>13</sup> the State Courts overruled pleas of pre-

<sup>13</sup> In *Borden*, the union rule forbade the member himself obtaining, rather than being referred through union procedures to, a job under the jurisdiction of a sister Local; in this case, of course, the Union rules related to dues and the Union's interference with plaintiff's employment rights was to procure his discharge from, rather than to preclude his obtaining, the one particular job involved. If this factual difference establishes any legal difference, it makes this an even stronger case for pre-emption than *Borden*, since discharges based on dues delinquency are expressly regulated by the Congress and the Board. See pp. 28-33, *supra*, and pp. 52-55, *infra*.

emption and asserted jurisdiction; and the State results were substantial money judgments for the plaintiffs affirmed by the State appellate courts.

In *Borden* as in all pre-emption cases after *Garmon*, this Court used *Garmon* as the springboard for decision. By virtue of *Garmon*, the Court declared, "the first inquiry, in any case in which a claim of federal pre-emption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." 373 U.S. at 694. Respondent and the Court below actually pay lip service to this *Garmon* test, but insist, as did Respondent and the Court below in *Borden* (*ibid.*), that the Union conduct here may not be asserted to be within Labor Board cognizance. This Court disagreed:

"The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the Union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8(a)(3)." *Ibid.* (emphasis in original).

That holding governs this case precisely. Under the allegations of the Complaint and the facts found by the Idaho District Court, the Union business agent, with

the ultimate approval of Petitioners, refused to consider Respondent as having paid his dues timely, and this refusal resulted in Respondent's discharge from his Greyhound job. Beyond doubt, that refusal and the resulting discharge from employment "were in some way based on respondent's actual or believed failure to comply with internal union rules." Certainly Respondent's "actual or believed" dues delinquency was the trigger of the events which constitute his claim and proof in this case. Indeed, Respondent's claim and recovery is based upon the proposition that he was not *actually* in default of his dues, but was *actually* a member in good standing, although the Union *believed* that he had failed to make his critical dues payment within the time specified in the International Union Constitution and therefore had lost his membership in good standing. It makes no difference whether the Union was right or wrong in its belief that Respondent had failed to comply with its internal rules. For in either event—"actual *or* believed failure to comply with internal union rules"—the State Court cannot properly assert jurisdiction.

In this case, it is certain, not merely a "substantial possibility" as it was in *Borden*, "that [Respondent's] failure to live up to the internal rule \* \* \* was precisely the reason why" he was discharged (*id.* at 695), and under the allegations of the Complaint and the finding of the District Court there is certainly—as the Court below itself explicitly conceded (A. 98)—and *a fortiori* "arguably" a violation of §§ 8(b)(1)(A) and 8(b)(2) of the Act. Inasmuch as Petitioners have always believed that Respondent was delinquent and therefore was properly discharged pursuant to a valid union-security clause, "[i]t may also be reasonably

contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7." 373 U.S. at 695. Indeed, the repeated Congressional references to union-security clauses in the text and in the legislative history demonstrate that union conduct in conformity with the Act is quite clearly protected activity, at least to the same extent and degree as hiring halls. Obviously, the entire matter of requiring union membership to retain employment was (and remains) one of the most sensitive and bitterly contested in the entire area of labor relations in this country. "The problems inherent in the operation of" union-security clauses under the Act are just as "difficult and complex," see *infra*, pp. 52-55, as those inherent in the operation of hiring halls, and identically "point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency". *Id.* at 695-696.

In this pre-emption case as in *Borden* and the others, the only issue is the threshold issue of jurisdiction. Which tribunal shall decide the issues, the Board or the State Courts? Which shall determine how the union conduct shall legally be categorized, as prohibited, protected or otherwise; which tribunal shall read and interpret the collective bargaining agreement provisions and internal union documents, try the issues of fact and make findings; which tribunal shall ultimately decide whether the union conduct was rightful or wrongful, and if the latter, what are the appropriate remedies? To require the response that the Board is the proper tribunal, and the State Courts have no jurisdiction, this Court held in *Borden*, "[i]t is sufficient

for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction." *Id.* at 696.

In *Borden*, this Court squarely confronted the problem of reconciling the *Garmon* "arguably" standard with *Gonzales*. Respondent in *Borden*, like Respondent here, relied heavily upon *Gonzales*. *Ibid.* Respondent's position was that "restoration of union membership was a remedy that the Board could not afford and indeed that the *internal* affairs of unions were not in themselves a matter within the Board's competence." *Id.* at 696-697 (emphasis in original). But the Court rejected this position and distinguished *Gonzales* as follows:

"The *Gonzales* decision, it is evident turned on the Court's conclusion that the lawsuit was focused on purely internal matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.  
\* \* \*

"*The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'cruz' of the action \* \* \* concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.*" *Id.* at 697.

By these touchstones, this case is manifestly governed by *Borden* and not by *Gonzales*. The Union's



procuring the discharge of Lockridge by Greyhound obviously dealt directly with Lockridge's employment, at least as directly as did the refusal of the Union to give Borden clearance. Accordingly, this lawsuit is not focused on purely internal matters. It is indeed focused principally, if not entirely, on the Union's actions with respect to obtaining Lockridge's discharge. That Lockridge himself so viewed his case is demonstrated by the fact that he himself never requested restoration of Union membership rights. He sought no equitable relief. Consequently, there was no State remedy to "fill out" by permitting the award of consequential damages. As certainly as in *Borden*, the "crux" of this action concerned Lockridge's employment relations and involved conduct arguably subject to the Board's jurisdiction.

This Court emphasized in *Borden* that:

"It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in *Garmon, supra*, 359 U.S., at 246,

'[o]ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to left unhampered.' (Emphasis added).

"In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." *Id.* at 698 (emphasis in original).

Accordingly, as in *Borden*, the judgment of the Court below must be reversed.

*Iron Workers v. Perko*, 373 U. S. 701 (1963)

*Perko* was a case companion to *Borden*. *Perko* also sued a union because of its interference with his right to obtain employment on the ground it believed he had violated a union rule. *Perko* likewise obtained a judgment which the State Court permitted to stand as against the plea of pre-emption; but this Court reversed. In *Perko* this Court re-emphasized the distinctions of *Gonzales* and the legal principle that the Board should adjudicate where the union conduct embraces employment consequences. "At the outset," this Court noted that "the rationale of the *Gonzales* case does not support state jurisdiction here" for the reasons set out in *Borden*; "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." 373 U.S. at 705.

*Perko* sought to avoid the force of the pre-emption principle by arguing that he was a foreman and thus not subject to the Act. The Court held, however, that he might well be an "employee" within the meaning of the Act; the Board should be given the initial opportunity to interpret the Act and determine whether he was an employee, and, even if he were not, to determine whether discrimination against him for the reasons indicated might violate the Act. If the Board were to find that he was covered by the Act, the Court held, "*Perko*'s complaint—that the [Union] caused his discharge and prevented his subsequent employment \* \* \* —falls within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8(b)(2) of the Act." *Id.* at 706-707. Manifestly, in this case the Board had jurisdiction to determine Respondent's

"membership" status under the union-security provisions of the collective bargaining agreement and the International Union Constitution, for Respondent's complaint surely falls within the ambit of the union-security provisions of §§ 8(b)(1)(A) and 8(b)(2) of the Act prohibiting as an unfair labor practice a union's improperly obtaining an employee's discharge by advising the employer he had not timely tendered his union dues.

This Court reiterated in *Perko* that pre-emption is a threshold question of jurisdiction, to be decided prior to and distinct from the merits:

"We do not of course intimate any view of the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be *Reversed*." *Id.* at 708. (emphasis in original).

*Day v. Northwest Division 1055, et al.*, 238 Ore. 624, 389 P.2d 42 (1964), cert. denied, 379 U.S. 874 (1964)

*Day* demonstrates that a State Supreme Court intending in good faith to comply with the letter and spirit of this Court's pre-emption decisions will clearly understand *Garmon*, *Borden* and *Perko*.

After the Board ruled he had no case against the Union, see pp. 55-58, *infra*, Day filed suit in the Oregon Courts. The Oregon trial court held it had jurisdiction, despite the plea of pre-emption, and Day recovered a substantial jury verdict. The Oregon Su-

preme Court reversed, holding that the case was indeed pre-empted and that the State Courts could assert no jurisdiction, primarily because such a result was held required to comply with this Court's decisions in *Borden and Perko*. 238 Ore. 624, 389 P.2d 42 (1964). Day petitioned for a writ of certiorari, contending that the Oregon Supreme Court misconceived the Federal law; but this Court denied the writ. 379 U.S. 878 (1964); No. 301, O.T. 1964.

In *Day* the Oregon Supreme Court held that, under the Act:

"a union may lawfully require an employer to discharge an employe for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. If the request for discharge has been honest and for the actual reason assigned, the union and employer are within their rights and it is held that no unfair labor practice has occurred. But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.

"*Garmon, supra, Borden and Perko* all tell us that if the conduct alleged 'may reasonably be asserted to be subject to Labor Board's cognizance,' then the courts, both state and federal, are without any right to proceed. In this case the Board does reasonably have cognizance of the question at issue and we must desist from further proceedings." 238 Ore. at 627, 389 P.2d at 44.

Manifestly, there is irrepressible conflict between the Oregon judgment in *Day* and the Idaho judgment in

this case. While both decisions purport to apply the identical Federal law, pronounced in the identical decisions of this Court, to the identical union conduct, *Day* subordinates Oregon law to Federal jurisdiction, while the decision below renders Idaho law supreme over Federal law. *Day* is in allegiance to the pre-emption decisions of this Court. The decision below is in rebellion against them. There is only one resolution of this conflict which this Court can reach faithful to its own long-established and consistently pronounced pre-emption principles.

**b. The efforts of the majority below to distinguish Borden, Perko and Day are unavailing.**

To accomplish the result it desired in favor of Respondent Lockridge, the majority found it necessary to disregard or distort the record in this case, refuse to honor the pre-emption decisions of this Court both as to their general principles and their particular holdings, and arrogate for itself the role of ultimate arbiter of what was vital in the national labor policy and what could be disregarded therein.

The majority's characterization of this case as an "[a]ction by a former member of a labor union against the union for reinstatement to membership" (A. 89) simply disregards the pellucid fact of record that Respondent never sought reinstatement to membership; but, quite to the contrary, sought a lifetime income from Petitioners which would make Union membership an economic irrelevancy to him. A similar refusal to accept the Complaints as they were actually filed by Lockridge and appear in the record is reflected in the majority's assertion that "[f]rom the outset respondent attempted to regain his membership. \* \* \* The

complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief." A. 99 (emphasis in original). The persistently monocular perception of the record, shutting the one eye to "employment" and fixing the other on "membership" only, produced the assertion, "this case has been submitted and tried on the interpretation of the contract," signifying the membership and excluding the employment contract. A. 106. In any full and fair reading of the record, however, as the dissent pointed out, this was certainly an employment relationship case because all of the relief except restoration to union membership "necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement?" A. 124-125. The majority held that Lockridge should be "restored by the appellant union to full seniority rights" (A. 109), simply failing to recognize or mention that "seniority" has nothing to do with union membership and relates solely to length of *employment*. Indeed, as we have seen, the District Court held it lacked jurisdiction to award seniority for precisely this reason. A. 55. The majority's fundamental predicate that this case did not at all or significantly involve the employment relationship is utterly alien to the actual record in this case.

The majority's refusal to honor the general principles of the pre-emption decisions of this Court is demonstrated, as noted above, by its simultaneously acknowledging both that under those decisions there

is no State jurisdiction where the union conduct is "arguably" protected or prohibited under the Act and that the union conduct in this case was prohibited under the Act—and yet insisting upon asserting Idaho Court jurisdiction! The Court below in particular refused to follow *Borden* and *Perko*. In those cases, the Court said, there had been no denials of membership (A. 105); the Court below did not explain what relevancy this had, since its opinion demonstrates it was relying upon the contract between the member and the union, the identical contract upon which the State Courts had relied, but this Court had rejected, as a basis for asserting State jurisdiction in those cases. There was no response in the majority opinion to the dissent's analysis that "[t]hose cases did not turn on the fact of membership or non-membership in the defendant union. The touchstone in each of those cases was a denial of the rights of a union member which effectively caused that member to be deprived of employment which he otherwise had." A. 123-124.

The majority below also proffered as a distinction that in both *Borden* and *Perko* "the individuals complained that they had been denied the benefits of a *particular* job." A. 105 (emphasis in original). The majority opinion itself refers to only one particular job in this case, which certainly involves only one particular job, Lockridge's bus driving job with Greyhound. Finally, the majority stated, "*Borden* involved 'difficult and complex problems inherent in the operation of union hiring halls' while *Perko* presented 'difficult problems of definition of status and coercion \* \* \* of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.'" A. 106. The Court below made no comment whatever on this, apparently unable to suggest



any answer to the question why the application of union-security clauses and the definition of the "membership" statuts thereunder did not present "difficult and complex problems", those "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." In fact, as the dissent made clear, "[t]he problems of interpretation of the union charter and the bargaining contract here are no less difficult than are some of the 'problems of definition' consigned to the Board in *Perko*. It is not, despite the *ipse dixit* of the majority, 'obvious \* \* \* that Lockridge was *not* subject to suspension or dismissal.'" A. 125 (emphasis in original).

The majority below acknowledged that "[t]he result we reach is contrary to that reached in *Day v. Northwest Division 1055, et al.*, 389 P.2d (1964)." A. 106. It sought to distinguish *Day* on the ground that "there is a specific finding of discrimination on the part of the union" in that case whereas "[t]here was no such finding in this case \* \* \*." *Ibid.* The Court cites no authority, and there would appear to be none, for the assertion that there was any specific finding of discrimination in *Day*. Moreover, the assertion that there is no such finding in this case must be bottomed upon the extraordinary notion that a finding of disparity of treatment is not a finding of discrimination. According to both the allegations of the Complaints and the Findings of the District Court, Petitioners had treated the dues and employment status of Respondent in a unique and unprecedented way as compared to others in the identical position. A. 17-18, 46-47, 60-61, 64-65. Indeed, as the treatment Petitioners afforded both *Day* and *Lockridge* is identical, it is obvious that the significant facts as to disparity of treatment and discrimination are identical in the two cases. Both men alleged

and proved they were treated differently from other members in the identical dues and employment status. In any event, the Court below itself undermined any distinction between the two cases based upon the presence or absence of discrimination, by acknowledging that "the Board might find an unfair labor practice in *both* an underlying 'discriminatory' motivation and an honest misunderstanding of the contract \* \* \*." A. 106. Consequently, the majority's attempted distinctions from *Day* cannot survive analysis.

As if these fallacies in its opinion were insufficiently egregious, the majority below obviously regarded itself as having the power and responsibility independently to appraise the various facets of the national labor policy, and to segregate what was important and therefore pre-empted from what was less important in its view and therefore susceptible to its regulation. Its appraisal enabled it to proffer a distinction between *Garmon* and this case, that *Garmon* "involved conduct which represented one of the vital tools of organized labor and a protected right for all employees—picketing[,] \* \* \* the most fundamental aspects of concerted action, the very heart of the national labor policy, over which the regulation of the Board has never been questioned. Here the conduct centers on membership rights in the union, critical from an individual member's viewpoint, but conduct, excluded from the operation of the Act." A. 102, 105.<sup>14</sup> The Court did not even assay any

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<sup>14</sup> The Court below did not originally follow the pre-emption precepts even as to picketing; its conversion to the view it now espouses required the ministrations of this Court. *Retail Clerks International Association, Local No. 560 v. J. J. Newberry Company*, 352 U.S. 987 (1957), *summarily reversing* 78 Idaho 85, 298 P.2d 375 (1956); *Pocatello Building & Construction Trades Council v. C. H. Elle Construction Co.*, 352 U.S. 884 (1956), *summarily reversing* 77 Idaho 514, 297 P.2d 519 (1956).

elucidation of why union security is not one of "the vital tools of organized labor or one of "the most fundamental aspects of concerted action", nor why the entire matter of union-security provisions and their application, so extensively and expressly regulated by the Congress, did not involve "the very heart of the national labor policy \* \* \*." Perhaps the Court had not examined the whole body of that policy. Certainly the competent diagnosis of that policy as it is administered in day-to-day life is that the regulation of the Board has indeed never been questioned with respect to union-security matters which may center on membership rights in the union but certainly are not excluded from the operation of the Act. See pp. 52-55, *infra*. Why membership rights are "critical from an individual member's viewpoint" except for the impact on employment, which the Court hardly saw as involved in this case, the Court below did not explain. While the majority presumed to rank the various aspects and organs of the national labor policy so that it could assert jurisdiction over and cut off in its surgery whatever it might opt to regard as less important or less vital, the dissent took the position that "it is not for us to decide if our intrusion into the regulation of this conduct will '\* \* \* militate in favor of the basic purpose for which national labor law was created.' That determination, no matter what may be our own view of our competence, has been taken from us and vested wholly in the expert N.L.R.B., as a matter of federal law \* \* \*." A. 125. By the force of *Garmon*, *Borden* and *Perko*, and *Day* as well, this judgment was manifestly correct and the majority's clearly in error.

**C. This Union Conduct Is Routinely and Normally Adjudicated by the NLRB Which Considers and Decides the Very Issues Presumed To Be Considered and Decided by the State Courts in This Case.**

It is the Board, and not the State Courts, which routinely and normally regulates the Union conduct involved in this case, a union's procuring an employee's discharge pursuant to a union-security clause in a collective bargaining agreement. It is the Board, and not the State Courts, which adjudicates the controversy, which tries the facts and makes the ultimate determination of law as to whether the union conduct has been proper or improper, and what remedy, if any, shall be provided. This is demonstrated by the plethora of Board cases involving such union conduct under § 8(b)(2) and related provisions of the Act.<sup>15</sup> In virtually all of them, the union's advising the employer that the employee is delinquent in his dues payments and has thus surrendered his union membership under the union's internal rules is the cause of the resulting loss of employment.<sup>16</sup> To adjudicate whether

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<sup>15</sup> For a complete catalogue of the cases, see, e.g., American Digest System, Labor Relations, Key Numbers 368, 395 (West Publishing Company); Cumulative Digest and Index, LRRM, §§ 59.230-59.231 (Bureau of National Affairs); Labor Law Reporter Par. 4525 (Commerce Clearing House).

<sup>16</sup> The union conduct of causing a discharge for dues delinquency is presumptively a violation of the Act; showing that the statutory exception is applicable—that the discharge was in fact for failure to tender the uniform periodic dues and was in compliance with a valid union-security clause—is a matter of affirmative defense. See, e.g., *Local 545, Operating Engineers*, 161 NLRB 1114, 1119 (1966); *Marble Polishers, Etc., Local No. 121*, 132 NLRB 844 (1961); *Local 84, International Ass'n. of Bridge*, 129 NLRB 971 (1960). Moreover, the burden of proof on the issue

or not an unfair labor practice has been committed, the Board must determine the actual dues status of the member and its application to his employment status under the collective bargaining agreement; and thus must invariably investigate and interpret the pertinent union dues rules and practices and the pertinent provisions of the agreement—precisely the same matters

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of whether an action which would otherwise violate § 8(b)(2) is made lawful and protected by the proviso is on the party accused of the violation. See, e.g., *Local 545, Operating Engineers, loc. cit. supra*; *Operative Plasterers, Etc. Local No. 2*, 149 NLRB 1264, 1281-1282 (1964). In a case where dues payments are contested, the Board must first consider, in a case of this sort, "whether the dues delinquencies existed in fact." *United Sugar Workers Union, Local 9*, 149 NLRB 154, 160 (1964). As was held in *International Union of Electrical, R. & M. Wkrs. v. N.L.R.B.*, 113 U.S. App. D.C. 342, 347, 307 F.2d 679, 684 (1962), *cert. denied*, 371 U.S. 936 (1962) (emphasis in original), "the Board was not required to make an affirmative determination that all or any of these factors [personal hostility] comprised the actual basis or motivation for the Union's demand for [the employee's] discharge. No affirmative finding as to the cause of discharge is needed. Under the language of the statute the Union commits an unfair labor practice when it causes an employer to discriminate against an employee 'on some ground *other than* his failure to tender the periodic dues and the initiation fees uniformly required \* \* \*.'" Indeed, even if the employee was in fact delinquent, the Union has the additional obligation of showing that it fully apprised him of his dues status. See, e.g., *N.L.R.B. v. Operating Engineers, Local 139*, — F.2d —, 73 LRRM 2842, 2844 (7th Cir. 1970); *N.L.R.B. v. Local 182, International Bro. of Teamsters*, 401 F.2d 509 (2nd Cir. 1968), *appeal dismissed and cert. denied*, 394 U.S. 213 (1969); *N.L.R.B. v. Hotel, Motel and Club Employees' Union, Local 568*, 320 F.2d 254 (3rd Cir. 1963); *International Union of Electrical, R. & M. Wkrs. v. N.L.R.B., supra*; *Retail Store Employees Union, Local No. 655, AFL-CIO*, 180 NLRB No. 157 (1970); *Local 545, Operating Engineers, supra*, at 1120-1121. Cf. *N.L.R.B. v. Zoe Chemical Co.*, 406 F.2d 574 (2nd Cir. 1969).

which the State Courts adjudicated in this case.<sup>17</sup> Manifestly, the substantive issues in this case would present only an ordinary, run-of-the-mine §§8(b)(2)-8(b)(1)(A) case to the Board. The legal characteristics of this case are homogeneous with these Board

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<sup>17</sup> Even the majority below recognizes that *Krambo Food Stores, Inc.*, 114 NLRB 241 (1955), *enforced sub. nom. N.L.R.B. v. Allied Independence U.*, 238 F.2d 120 (7th Cir. 1956) was an illustration of the Board's concern with the very issues of interpretation of a Union Constitution with which the State Courts were here concerned. A. 98. The Board in *Krambo*, after considering the Union Constitution and practice, found that the member employees had indeed paid dues within the time allowed by the Union Constitution; and concluded:

"As the complainants were discharged during the 30-day grace period at the request of the Union, their discharge constituted a discriminatory denial to the complainants of the grace period allowed them for the payment of dues by the Union's constitution.

"Accordingly, we find the Respondent Union violated Section 8(b)(2) in that it did cause the Respondent Company to discriminate against employees [named] by terminating their employment on some ground other than the failure to tender the periodic dues uniformly required as a condition of retaining membership in the Union." 114 NLRB at 243-244.

Additional cases in which the Board interpreted dues provisions of the Union Constitution and the Union practices in connection therewith in applying § 8(b)(2) include: *N.L.R.B. v. Leece-Neville Company*, 330 F.2d 242 (6th Cir. 1964), *cert. denied*, 379 U.S. 819 (1964); *N.L.R.B. v. Shear's Pharmacy, Inc.*, 327 F.2d 479 (2nd Cir. 1964); *N.L.R.B. v. Spector Freight System, Inc.*, 273 F.2d 272 (8th Cir. 1960), *cert. denied*, 362 U.S. 962 (1960); *Communications Workers of America v. N.L.R.B.*, 215 F.2d 835 (2nd Cir. 1954), *enforcing New Jersey Bell Telephone Company*, 106 NLRB 1322 (1953); *Local Union No. 703, Laborers' International Union*, 181 NLRB No. 140 (1970). Likewise, the Board has reviewed minutes of Union meetings, transcripts of internal Union hearings and like evidence, in relation to dues delinquency problems under the Act: e.g., *Tracy Towing Line, Inc.*, 166 NLRB 81 (1967), *enf'd sub nom., N.L.R.B. v. United Marine Div., Local 333, Na-*

cases. There is no unique attribute of the circumstances at bar which can justifiably segregate this case from the routine §§8(b)(2)-8(b)(1)(A) Board case.

Accordingly, this is the most glaring possible State Court violation of the *Garmen-Borden-Perko* preemption principles declared by this Court. Vindication of those principles, of bedrock import in the Federal System, demands reversal.

**D. There Is Actual Conflict Between the Board's View and the State Court's View of the Union Conduct in This Case.**

At the same time that they caused Greyhound to discharge Lockridge, Petitioners caused the discharge of another Greyhound driver, Elmer J. Day, for the identical Union dues delinquency. In fact, the Union requested the discharge of both Day and Lockridge in the same letter to Greyhound. A. 82. Lockridge indicated he and Day were "singled out" because they had withdrawn themselves from the check-off. A. 77. The District Court's unchallenged finding on this record was, "One Elmer Day was likewise suspended under *identical circumstances*." A. 60. The Court below conceded, "[t]he result we reach is contrary to

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*tional Mar. U.*, 417 F.2d 865 (2nd Cir. 1969), *cert. denied*, 397 U.S. 1008 (1970); *United Brewery Workers*, 166 NLRB 915 (1967).

Cases involving the timeliness of tender, an issue which evidently concerned the Court below (A. 108), likewise present factual and legal issues akin to those presented in this case. See, e.g., *N.L.R.B. v. Food Fair Stores, Inc.*, 307 F.2d 3 (3rd Cir. 1962); *General Motors Corp., Packard Electric Division*, 134 NLRB 1107 (1961).

A union's good faith belief that its action is proper under the collective bargaining contract is no defense to this charge of unfair labor practice. See, e.g., *Local 140*, 109 NLRB 326, 328-329 (1954); *Plywood Workers Local Union No. 2498*, 105 NLRB 50, 55-56 (1953).



that reached in *Day v. Northwest Division 1055, et al.*, 389 P.2d 42 (1964)." A. 106.

Unlike Lockridge, Day did first file a charge against the Union with the Board.<sup>18</sup> After investigation, the Board dismissed the charge because there was "insufficient evidence of violations \* \* \*." A. 13-14. Inasmuch as the critical facts, the timing of the dues payments and the wording of the dues provision in the International Union Constitution and union-security clause in the collective bargaining agreement, were identical in the two cases, and inasmuch as it would appear crystal clear that the facts alleged by Lockridge and found by the Idaho District Court would constitute an unfair labor practice under §§ 8(b)(2) and 8(b)(1)(A) of the Act, the only possible explanation for the Board's refusal to proceed in the *Day* case is that the Board, on the basis of its own investigation, found the facts to be different from those alleged and found in the present case. In other words, the Board must have found either (1) that the suspension of Day's Union membership was *not* inconsistent with the Union's Constitution or (2) that Day's discharge was *not* related to his loss of Union membership. Only by

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<sup>18</sup> Obviously, the Board provided a forum to Lockridge to adjudicate whether the Union conduct involved in his case was protected or prohibited. See pp. 52-55, *supra*. Manifestly, this is not a case in which Congress "has provided no remedy" or in which, "if the states were pre-empted from acting, there would be an absence of any legal remedy." *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 227-228 (concurring opinion) (1970). This is indeed a case where the Act "provided an effective mechanism whereby an [employee] could obtain a determination from the National Labor Relations Board as to whether [the union conduct involving him] is protected or unprotected \* \* \*." *Longshoremen v. Ariadne Co.*, 397 U.S. 195, 201 (concurring opinion) (1970).

making one or both of these findings could the Board have concluded that there was "insufficient evidence of a violation."<sup>10</sup> On the other hand, Lockridge alleged, and the State Courts below found, that Petitioners were liable, because of the precisely contrary contentions and findings—both (1) that the suspension of Lockridge's Union membership *was* inconsistent with the Union's Constitution, and (2) that Lockridge's discharge *was* related to his loss of Union membership. Only by making these findings, contrary to what the Board must have found in *Day* and would presumably have found here, could the District Court below have concluded that Respondent had proved his claims and that Petitioners were liable.

The short of the matter is that the Board evidently concluded that Petitioners had acted lawfully, while the Idaho Courts concluded that they had acted un-

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<sup>10</sup> "In addition, when the Board has actually undertaken to decide an issue, the litigation in a state court creates more than theoretical danger of actual conflict between state and federal regulation of the same controversy." *Marine Engineers v. Interlake Co.*, 370 U.S. 173, 185 (1962). Furthermore, even if the refusal to issue a complaint be thought not to be a disposition on the merits, that would not authorize the State Courts to act. "In [*Guss v. Utah Labor Relations Board*, 353 U.S. 1] we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to State jurisdiction. \* \* \* The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Garmon*, at 246.

lawfully. There could hardly be a more vivid illustration of *actual* conflict between Federal and State authority which it is the very purpose of the pre-emption doctrine to avoid.

## II.

**THE STATE COURT HAD NO JURISDICTION OVER THE CONDUCT INVOLVED IN THIS CASE BECAUSE CONGRESS HAS COMPREHENSIVELY REGULATED AND THUS FORECLOSED IT FROM STATE COURT JURISDICTION.**

**A. Congress Has Regulated All Discharges Under a Union-Security Clause Procured by a Union's Claim That an Employee Has Not Timely Tendered the Periodic Union Dues Uniformly Required as a Condition of Maintaining Membership.**

In demonstrating that the Union conduct in this case was certainly either protected or prohibited under the Act, see pp. 28-33, *supra*, we established that the field of Union conduct involved in this case, the procuring of an employee's discharge under a union-security clause by a union's advising the employer that the employee has not timely tendered the periodic union dues uniformly required as a condition of retaining membership, has been comprehensively regulated by the Congress. The entire catalogue of cases involving this particular type of union conduct has been regulated by Congress in the Act. There are no exceptions. We need not reiterate the discussion, but we would reemphasize it at this point because of its crucial significance in the instant context.

**B. By Its Comprehensive Regulation of This Union Conduct, Congress Has Precluded the Exercise of State Jurisdiction Over It.**

In deciding whether State jurisdiction may be exercised over union conduct, separate and apart from any inquiry as to whether the "arguably" standard is ap-

plicable, "it is still necessary to determine whether \*\*\* 'Congress occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457." *Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964).

In *Automobile Workers*, the Court was concerned with strikes in interstate commerce, and in particular peaceful strikes for higher wages. It held that the Act prohibited "concurrent state regulation" of this field. *Automobile Workers v. O'Brien*, 339 U.S. 454, 457 (1950). The Court reaffirmed this holding when a State sought to justify regulation of such strikes on the ground that the industry involved was a public utility. *Bus Employees v. Missouri*, 374 U.S. 74 (1963).

In the *Morton* case, the Court reversed a verdict obtained under § 303 of the Act, 29 U.S.C. 187. This Section provides for the recovery of damages for union conduct which is an unfair labor practice under § 8(b) (4) of the Act. Congress obviously knew how to permit damage lawsuits for unfair labor practice conduct, when it intended to do so. In *Morton*, there was proof of some union conduct violating § 303. Because jurisdiction thus attached, the lower Federal courts believed they had jurisdiction also to try other union conduct under State law; and recovery was granted on that theory. This Court reversed, however, holding that the scope of jurisdiction for courts and of recovery for plaintiffs was circumscribed by the explicit Congressional regulation. "The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.' *Local 1976 v. Labor Board*, 357 U.S. 93, 98." 377 U.S.

at 258. The essence of the Court's holding was expressed as follows: "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the Congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 259-260. Identically, in this case, if the Idaho judge-made law of tort and union-member contract recovery can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §§ 8(b)(2) and 8(b)(1)(A), the inevitable result would be to frustrate the Congressional determination to leave this weapon of discharges under valid union-security clauses available, and to upset the balance of power, with respect to union-security clauses and thus generally, between labor and management expressed in our national labor policy.

While the *Morton* case dealt in particular with the field of secondary boycott activity condemned by § 303, State jurisdiction has been struck down also in the more general field of peaceful picketing in a manner and for objectives not prohibited by the Congress. The Court expressed this quite clearly in the following oft-cited passage in *Garner v. Teamsters Union*, 346 U.S. 485, 499-500 (1953):

"The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall

within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits."

The parallelism to this case is manifest. For Idaho to impinge upon the area of application of union-security clauses which Congress permitted to be executed and enforced is quite as much an obstruction of Federal policy as if the State were to permit a union shop, or a union-security clause valid in less than 30 days, or otherwise to sanction the application of union-security clauses for purposes or by methods which the Federal Act prohibits.

Moreover, inasmuch as the Act protects and encourages collective bargaining and seeks to prevent labor disputes by promoting their settlement through collective bargaining culminating in the execution of an agreement which will contain such provisions as the employer and the union may desire, the Court has struck down official action, State or Federal, which it regarded as in actual or potential conflict with that basic general Congressional purpose. See, e.g., *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), where the application of the Ohio antitrust law was struck down because its effect would outlaw wage agreements reached in consonance with the Act; and *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962), where the grant of a certificate of convenience by the Interstate Commerce Commission was remanded so that the Commission could consider the impact of Federal labor legislation.

Further, in the field of the general regulation of labor relations under State Labor Relations Acts, the Court has held that State jurisdiction may not be exercised over any area covered by the Federal law. *Guss v. Utah Labor Board*, 353 U.S. 1 (1957). "Congress has expressed its judgment in favor of uniformity." *Id.* at 10-11.

Other examples of attempted State regulation of industrial relations which have been struck down on the ground that Congress occupied the particular field include: application of an unemployment compensation statute to deprive an employee of such benefits as a consequence of filing a Charge with the Board, *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967); attempted regulation of foremen at a time when they were subject to Federal labor legislation, *Bethlehem Co. v. State Board*, 330 U.S. 767 (1947); requiring registration and licensing in order to engage in activity protected or permitted by the Federal Act. *Hill v. Florida*, 325 U.S. 538 (1945).

The Act is "of course the law of the land which no state law can modify or repeal," *Nash v. Florida Industrial Comm'n*, *supra*, at 238, "[a] national system for the implementation of this country's labor policy \* \* \*," *id.* at 239, a national system of substantive law and, in addition, prescribing a "centralized administration of specially designed procedures [which Congress considered] was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953).

The decision below purports to accomplish precisely that which Congress and this Court had forbidden, dif-



ferent labor policies and labor laws being enforced throughout the land, emanating from the varying local attitudes towards labor controversies, thwarting uniform administration and enforcement of the national system for the implementation of this country's labor policies. In short, Idaho is here seeking to secede from that national system. A State Supreme Court decision thus according supremacy to State over Federal law is at war with the mandate of the Supremacy Clause that Federal law shall be accorded to sovereign rank throughout the United States. It cannot survive.

### CONCLUSION

For the reasons stated herein, the judgment below should be reversed and the cause remanded with direction to dismiss this action.

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**STATUTORY APPENDIX**  
**CONSTITUTIONAL AND STATUTORY**  
**PROVISIONS INVOLVED**

**Constitution: Supremacy Clause**

Article VI, Section 2 of the Constitution of the United States reads in pertinent part as follows:

“This Constitution and the Laws of the United States which shall be made in Pursuance thereof \* \* \* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

**National Labor Relations Act: Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2)**

The pertinent statutory provisions are the following, in the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*:

*Section 7*, 29 U.S.C. § 157, provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] of this title.”

*Section 8(a)(3)*, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer:

“by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, \* \* \* : *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization \* \* \* (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

*Section 8(b)(1)(A)*, 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce \* \* \* employees in the exercise of the rights guaranteed in section [7]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein \* \* \* ."

*Section 8(b)(2)*, 29 U.S.C. § 158(b)(2) provides in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—\* \* \* to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1969**

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**No. 1072**

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR EMPLOYEES OF AMERICA ET AL.,  
PETITIONERS**

**v.**

**WILSON P. LOCKRIDGE**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF IDAHO**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS  
AMICUS CURIAE**

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**INTEREST OF THE NATIONAL LABOR RELATIONS BOARD**

The question presented in this case, in which certiorari was granted on March 30, 1970, is whether the National Labor Relations Act preempts a State court suit for damages for loss of employment brought by a union member complaining that the union wrongfully caused the employer to discharge him for dues delinquency under the union-security clause of the collective bargaining agreement. Since the conduct complained of is "arguably" an unfair labor practice under Sections 8(b)(2) and (1)(A) and 8(a)(3)

of the National Labor Relations Act (*infra*, p. 12, n. 8), the Board believes that this question should be answered affirmatively. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245; *Plumbers' Union v. Borden*, 373 U.S. 690; *Iron Workers v. Perko*, 373 U.S. 701. The Idaho Supreme Court reached a contrary conclusion on the authority of *Machinists v. Gonzalez*, 356 U.S. 617, which, for the reasons given below, the Board believes is inapposite. The proper application of the preemption principle, which is designed to avoid interference with federal law by the application of inconsistent State law, is an important issue in the administration of the National Labor Relations Act and one in which the Board has a continuing interest.

#### STATEMENT

The collective bargaining agreement between Greyhound and the Union<sup>1</sup> required existing employees to become and remain members of the Union 30 days after the effective date of the agreement, as a condition of continued employment (A. 60, 88). Section 91 of the Union's Constitution and General Laws provided (A. 91-92):

Sec. 91. All dues \* \* \* of the members of this Association are due and payable on the first day of each month for that month \* \* \*. They must be paid by the fifteenth of the month in order to continue the member in

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<sup>1</sup> Petitioner Northwest Division 1055 is a geographic subdivision of petitioner Amalgamated Association, covering part of the State of Idaho (A. 57). Both are referred to here as "the Union."



good standing. \* \* \* A member in arrears for his dues \* \* \* after the fifteenth day of the month is not in good standing \* \* \* and where a member allows his arrearage \* \* \* to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage \* \* \* to run over the last day of the second month without payment, he does thereby suspend himself from membership in this Association. \* \* \* Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement.<sup>2</sup>

Wilson Lockridge was a member of the Union from May 1943, until November 2, 1959, and had been continuously employed as a bus driver for Western Greyhound Lines or its predecessor during that time (A. 59). On November 2, 1959, Lockridge was suspended from membership in the Union on the ground that he was in arrears in the payment of his October dues,<sup>3</sup> contrary to the requirements of the Union constitution and general laws. On the same day, the

<sup>2</sup> The Union apparently took the position that the collective agreement required a member to be "in continuous good financial standing" (see A. 51).

<sup>3</sup> Prior to September 1959, Lockridge's dues had been deducted from his paycheck by Greyhound, pursuant to a checkoff arrangement. In 1959, Lockridge and a number of other employees were released at their request from the checkoff; the Union indicated, however, that Lockridge would have to send his dues directly to the Union office in Portland, Oregon. (A. 80-81.)

Union notified Greyhound that Lockridge was no longer a member in good standing and requested that he be discharged pursuant to the union-security clause in the collective agreement. Greyhound discharged Lockridge. (A. 59-60, 82).

Lockridge did not file unfair labor practice charges with the National Labor Relations Board.<sup>4</sup> Instead, in September 1960, after the six-month limitations period in Section 10(b) of the National Labor Relations Act (29 U.S.C. 160(b)) had expired,<sup>5</sup> he filed suit in the State district court against the Union and Greyhound, which was later dropped as a party. The amended complaint contained two counts, one in tort and the other in contract. Count One alleged that the Union had sus-

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<sup>4</sup> Elmer Day was suspended from membership in the Union and discharged from Greyhound under the same circumstances. After his discharge on November 12, 1959, Day filed a charge with the Board's Regional Director. On December 15, 1959, the Director advised Day, by letter, that "it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters." The letter further advised that "you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board \* \* \*." (A. 93, n. 2.) Day made no request for review. Instead, he filed suit against the Union in the Circuit Court of Multnomah County, Oregon, for tortious interference with employment, and received a jury award for general and punitive damages. On appeal, the Supreme Court of Oregon (two judges dissenting) reversed, holding the conduct complained of to be within the Board's exclusive jurisdiction. *Day v. Northwest Division 1055*, 238 Ore. 624, 389 P. 2d 42, certiorari denied, 379 U.S. 878.

<sup>5</sup> Section 10(b) provides in relevant part: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board \* \* \*."

pended Lockridge from membership for dues arrearage when he was not in fact subject to suspension under the Union's constitution and laws, and had thereafter caused Greyhound to discharge him on the ground that he was no longer a member in good standing (A. 45-46). It further alleged that, "in suspending plaintiff from membership in the [Union] which resulted in plaintiff's loss of employment, the [Union] \* \* \* acted wantonly. wilfully and wrongfully and without just cause, and \* \* \* in a manner never before indulged in, and \* \* \* deprived plaintiff of his livelihood and all benefits of his employment with Greyhound Corporation that had accrued to him and would accrue to him by reason of his seniority and experience, and plaintiff has been harassed and subject to mental anguish, all to plaintiff's damage in the sum of \$212,200" (A. 46-47).

Count Two alleged that, "in wrongfully suspending plaintiff from membership in the [Union], which resulted in plaintiff's discharge from employment with the Greyhound Corporation, [the Union] \* \* \* violated the constitution and general laws of the [Union] which constituted a contract between the plaintiff \* \* \* and the [Union], and as a result of said breach of contract plaintiff has been deprived of his livelihood and all benefits from his employment with said Greyhound Corporation \* \* \* and plaintiff has been embarrassed and subjected to mental anguish, all to plaintiff's damage in the sum of \$212,200.00." The complaint sought damages of \$212,200 and "such other and further relief as to the court may appear meet

and equitable in the premises." (A. 48.) The complaint did not specifically request that Lockridge be reinstated to membership in the Union.

In April 1961, the Idaho district court dismissed the complaint. It found, as the Union had urged, that the gravamen of the complaint was that the Union had caused "plaintiff's employer to discriminate against him on grounds other than failure to tender uniformly required dues," and that "this constitutes an unfair labor practice" within the exclusive jurisdiction of the National Labor Relations Board (A. 26). The Idaho Supreme Court reversed, however, holding that the State court had jurisdiction under *Machinists v. Gonzales*, 356 U.S. 617 (discussed *infra*, pp. 13-16). The court relied, *inter alia*, on *Perko v. Local 207, Iron Workers*, 171 Ohio St. 68, 167 N.E. 2d 903, and *United Association of Journeymen, etc. v. Borden*, 160 Tex. 203, 328 S.W. 2d 739, which were subsequently reversed by this Court (*infra*, pp. 14-16). (A. 27-35.)

After trial, the Idaho district court held in Lockridge's favor. The court found that the union's "officers were irritated by plaintiff's [Lockridge's] refusal to go along with a voluntary dues check-off by Greyhound and mistakenly believing that they were technically correct, asked plaintiff's termination under the collective bargaining agreement because he was not in good standing. In doing so, they decided to make an example of plaintiff" (A. 50-51). The Union's actions were wrongful, the court further found, because the collective agreement "only requires that plaintiff re-

main a *member* of defendant union as a condition of employment, as contrasted to a requirement that the employee be a *member in good standing*"; moreover, the Union had departed from its "custom and tradition" of tolerating such "short term delinquency" (A. 51).<sup>6</sup> The court also found that, although "the pleadings have been amended rather substantially, the preemption issue is the same as it was when this matter first went to the Idaho Supreme Court"—Lockridge "continues to claim that he is entitled to damages for injury to his employment as distinguished from remedies for loss of union rights \* \* \*." But, the court concluded, though the Union's position that such a cause of action is preempted by the NLRA "is greatly reinforced by *Plumbers' Union v. Borden*, 373 U.S. 690, \* \* \* [and] *Iron Workers v. Perko*, 373 U.S. 701, \* \* \* I feel that I have been virtually directed by the Idaho Supreme Court to decide this case on the theories of 'Gonzales', and I must consider that decision the law of this case." (A. 52.)

Accordingly, the district court held that, "although plaintiff has never sought such remedy, he is entitled to restoration of his membership in [the Union] upon

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<sup>6</sup>The district court concluded that the acts of the Union "in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted the same," but that such interpretation was erroneous and thus "wrongful and resulted in a wrongful interference with plaintiff's employment, occupation and livelihood and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish" (A. 66).

payment of current dues, and in addition he is entitled to actual damages suffered as a result of loss of membership from the time of its wrongful termination to its restoration" (A. 52). Comparing the earnings of another Greyhound driver who took Lockridge's place on the seniority list with those shown by Lockridge's income tax returns from November 3, 1959, to September 15, 1965, the court found that Lockridge's "actual damages resulting from loss of his driving job with Greyhound have been \$32,678.56" (A. 52-53).

The court held, however, that Lockridge was not entitled to recover for future damages arising from continued loss of employment, since it was contemplated that "restoration of union membership will \* \* \* allow his reemployment at the same job" (A. 53). It also declined to award Lockridge any damages for his loss of seniority with Greyhound, or for the monetary value of any retirement and insurance benefits lost, or any punitive damages. The court concluded that it had no way of computing the first; that the value of the second had not been established; and that, as to the third, the Union had acted on the belief that its position was legally sound and Lockridge was partially at fault for not pursuing his remedies before the Board. ("I do not believe that it can be assumed that the N.L.R.B. would have acted unfavorably to plaintiff had he made application to it and had all the facts been fully presented to it.") (A. 53-54.)

On appeal, the Idaho Supreme Court (one judge dissenting) upheld the district court, but modified the judgment to provide that Lockridge's seniority rights be restored (A. 109, 111).<sup>7</sup> The Supreme Court found that the Union had engaged in conduct which "did most certainly" violate Section 8(b)(1)(A) and (2) of the National Labor Relations Act, and "probably caused the employer to violate 8(a)(3)" (A. 98). It held, however, that, in addition to these unfair labor practices, the Union broke the contract between it and Lockridge, which "provided that Lockridge would have continued membership in his union so long as he paid his dues no later than the end of the second month after they became due" (A. 98-99). Concluding that the "complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*," and that the "only relationship his employment has to this case is a means by which damages can be computed" (A. 99), the Idaho Supreme Court held that this case was governed by *Gonzalez, supra*, rather than the intervening decisions in *Borden* and *Perko, supra*. While noting that Lockridge's "prayer for equitable relief was framed in general terms," the court stated "that in this case or any other within the narrow area where we can assert jurisdiction to relieve wrongfully denied membership, the primary relief which can and shall be granted is restoration of union

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<sup>7</sup> The Supreme Court upheld the denial of damages based on mental suffering, holding such damages to be unavailable in contract actions (A. 110).



membership"; "[d]amages, if any, are a secondary consideration, and shall be limited to compensation for damage suffered until such time as membership is restored" (A. 99-100).

#### SUMMARY OF ARGUMENT

Where conduct arguably is protected or prohibited by the National Labor Relations Act, State and federal court jurisdiction over that conduct is preempted by the primary jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236. Here the conduct complained of—the action of the union in causing the discharge of a member on account of dues delinquency under the union-security clause of its collective agreement when he allegedly was not in fact delinquent—is arguably an unfair labor practice. Section 8(b)(2) and (1)(A) of the Act prohibit a union from causing an employer to discriminate against an employee on grounds other than his failure to tender periodic dues and initiation fees uniformly required as a condition of acquiring or maintaining membership; and Section 8(a)(3) prohibits an employer from acceding to a union demand which rests on other grounds. *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 40-42.

The Supreme Court of Idaho erred in relying on *Machinists v. Gonzales*, 356 U.S. 617, in which the exercise of State court jurisdiction was sustained. The subsequent decisions in *Plumbers Union v. Borden*, 373 U.S. 690, and *Iron Workers v. Perko*, 373 U.S.

701, make clear that *Gonzales* turned on the fact that the lawsuit there focused on relations between the member and the union that did not directly involve matters of employment. Where, as in *Perko* and *Borden* and here, the suit focuses "principally, if not entirely, on the union's actions with respect to [the member's] efforts to obtain employment" (*Borden, supra*, 373 U.S. at 697), relief may be sought only from the Board and State courts are without jurisdiction to provide it.

#### ARGUMENT

BECAUSE THE GRAVAMEN OF THE COMPLAINT WAS THAT THE UNION HAD WRONGFULLY INTERFERED WITH LOCKRIDGE'S EMPLOYMENT RELATION, THE SUBJECT MATTER OF THE SUIT WAS WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Here the Union's conduct in causing Greyhound to discharge Lockridge under the union-security agreement for dues delinquency is arguably prohibited by Sections 8(b)(2) and (1)(A), and Greyhound's action in discharging him for that reason is arguably prohibited by Section 8(a)(3), of the

Act.\* See *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40-42. Indeed, the Idaho Supreme Court found that "[the Union], in the opinion of this court, did most certainly violate 8(b)(1)(A), did most certainly violate 8(b)(2) [citation omitted] and probably caused the employer to vio-

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\* Section 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) \* \* \* or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce \* \* \* employees in the exercise of the rights guaranteed in section 7," which includes the right not only "to form, join, or assist labor organizations," but "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(3) makes it an unfair labor practice for an employer—

by discrimination in regard to hire or tenure of employment \* \* \* to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act \* \* \* shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which is the later \* \* \*: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization \* \* \* if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership \* \* \*.

late 8(a)(3), all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the National Labor Relations Board and are not subject to adjustment by, or interference with, Idaho courts" (A. 98).<sup>9</sup> Nevertheless, the Idaho Supreme Court held that it had jurisdiction to afford Lockridge relief under *Machinists v. Gonzales*, 356 U.S. 617, which was decided prior to *Garmon*. We submit that the Idaho court erred in concluding that the present case was governed by *Gonzales*, rather than *Plumbers Union v. Borden*, 373 U.S. 690, and *Iron Workers v. Perko*, 373 U.S. 701.

1. In *Gonzales*, a union member, who was wrongfully expelled because he brought assault and battery charges against an international representative of the union (298 P. 2d 92, 94), brought suit in a State court for restoration of membership in the union and for damages due to his illegal expulsion. The State court, finding a breach of the contract between the member and the union as embodied in the union constitution and by-laws, ordered Gonzales reinstated to membership and awarded him damages for physical and mental suffering and for lost wages. 356 U.S. at 618. This Court found that "the subject matter of the litigation \* \* \* was the breach of a con-

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<sup>9</sup> The situation here is thus not one where the Union's conduct was "clearly not proscribed by any part of § 8 of the Act," and the "only possible dispute could be over whether the [conduct] was activity protected by § 7 of the Act or \* \* \* was neither protected nor prohibited by the Act"—the situation where three members of this Court have recently called for a reconsideration of *Garmon*. *Longshoremen v. Ariadne Co.*, 397 U.S. 195, 201 (concurring opinion).

tract governing the relations between [Gonzales] and his unions"; the "suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under Section 8(b)(2)." *Id.* at 621-622. It held that, in these circumstances, the State court, which had power to order Gonzales reinstated to union membership, was not deprived of jurisdiction to "fill out" its reinstatement remedy by also awarding him damages for loss of employment, even though it was possible that the Board, too, could have awarded the latter relief. *Id.* at 620-621.

The limited scope of *Gonzales* was made clear in *Plumbers' Union v. Borden*, 373 U.S. 690, and *Iron Workers v. Perko*, 373 U.S. 701. In *Borden*, a member who was refused a job referral by the union because he had sought work directly, instead of through the union hiring hall, brought a State court suit against the union claiming, *inter alia*, that it "had breached a promise, implicit in the membership arrangement, not to discriminate unfairly or to deny any member the right to work" (373 U.S. at 692); the State court awarded the member damages for loss of earnings resulting from the refusal to refer and also punitive damages (*id.* at 693). This Court, finding that the union conduct complained of was arguably either an unfair labor practice under Section 8(b)(1)(A) or (2) of the Act, or activity protected under Section 7, held that the State court suit was barred under *Garmon*.

Distinguishing *Gonzales*, the Court stated (373 U.S. at 697):

The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, *i.e.*, on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.

On the other hand, the Court continued (*id.* at 697-698):

The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to "fill out" by permitting the award of consequential damages. The "crux" of the action \* \* \* concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.

Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. \* \* \* In the present case, the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.

Similarly, in *Perko* this Court, in reversing a State court's award of damages for past and future loss of earnings, held that the *Garmon* preemption principle barred a State court suit by a union member claiming that the union had wrongfully deprived him of his right to continue working as a foreman and had thereby caused his discharge. 373 U.S. at 702-704. Finding *Gonzales* inapposite, this Court stated: "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. \* \* \*" *Id.* at 705.

2. Here, as in *Borden* and *Perko*, the suit "focused principally, if not entirely, on the union's actions with respect to" the member's "employment relations." *Borden, supra*, 373 U.S. at 697. Although, as in *Gonzales*, the member alleged that he had wrongfully been deprived of union membership, here, unlike there, the reason for the deprivation had "to do directly with matters of employment," and damages for loss of employment, rather than union membership rights, was the "principal relief sought." *Ibid.* The Union's reason for suspending Lockridge from membership for alleged delinquency in his dues payments was, as its quick action in notifying Greyhound showed, to procure his discharge under the union-security clause of the collective agreement. Moreover, the "crux" of Lockridge's complaint—in both counts—was that the improper suspension had been used by the Union as a means of wrongfully procuring his discharge from Greyhound (*supra*, pp. 4-6). Lockridge never specifi-



cally sought reinstatement in the Union; the State court granted that relief, *sua sponte*, in an apparent effort to fit the case within *Gonzales* (*supra*, pp. 7-8).

The Idaho Supreme Court viewed *Borden* and *Perko* as distinguishable because the members there "*had never been denied their membership*," and because *Borden* involved "'difficult and complex problems inherent in the operation of union hiring halls' while *Perko* presented 'difficult problems of definition of status and coercion \* \* \* of a kind most wisely entrusted initially to the [Board] \* \* \*'" (A. 105-106). But these distinctions are insubstantial. As this Court's opinions show (*supra*, p. 15), the decisions in *Borden* and *Perko* turned, not on the question of union membership, but on the fact that the gravamen of the complaint was that, because of the member's loss of favor with the union, it had taken action which adversely affected his employment. Moreover, as the dissenting judge below pointed out (A. 125), the determination whether a union has been "acting in pursuance of a lawful union security agreement" is "not 'merely peripheral' to the Act nor is it one which involves wholly internal union matters"; it entails "precisely the sort of 'difficult and complex problems' which \* \* \* are solely within the [primary] competence of the expert National Labor Relations Board."

Indeed, whether a union has violated Section 8(b) (2) or (1)(A) of the Act by demanding a member's discharge under a union-security clause is a question the Board deals with repeatedly in numerous contexts, and it often involves difficult and subtle considera-

tions. Not only does the Board interpret the terms of union constitutions and by-laws and of union-security agreements to determine whether members are in fact delinquent (see *Pet. 19, n. 11*). The Board may also have to determine such other issues as whether the arrearage represents dues for which the union is entitled to seek discharge, or assessments for which it is not (*National Labor Relations Board v. Food Fair Stores, Inc.*, 307 F. 2d 3 (C.A. 3); *Teamsters Local 959 (RCA Service Co.)*, 167 NLRB No. 148, 66 LRRM 1203); whether the dues sought to be exacted are for a period covered by the union-security clause (*Operating Engineers, Local No. 139 (Camosy Construction Co.)*, 172 NLRB No. 12, 68 LRRM 1301); whether, even if the member is dues-delinquent, the union has fulfilled its fiduciary obligation of informing him of his obligation to join the union in order to keep his job (*National Labor Relations Board v. Local 182, Teamsters*, 401 F. 2d 509, 510 (C.A. 2), certiorari denied, 394 U.S. 213; *Electrical Workers, Frigidaire Local 801 v. National Labor Relations Board*, 307 F. 2d 679, 683-684 (C.A. D.C.), certiorari denied, 371 U.S. 936); whether the union's demand for dues was unlawfully conditioned on payment of some other obligation (*Assoc. of Western Pulp & Paper Workers (Fibre-board Paper Products Corp.)*, 170 NLRB No. 8, 67 LRRM 1605 (fines)); or whether the demand for discharge was in fact based on a reason other than the dues delinquency (*Rochester Roofing & Sheet Metal Co., Inc.*

165 NLRB 501, 504-505; *Zoe Chemical Co., Inc.*, 106 NLRB 1001, 1021, 1031, 1034, enforcement denied on other grounds, 406 F. 2d 574 (C.A. 2)).

In the present case, in order to determine whether the Union had violated Section 8(b)(2) or (1)(A) of the Act, the Board would have to interpret the same materials the State courts did: the Union's constitution, the union-security clause of the collective agreement, and the Union's past practice in administering membership obligations. The Board would have to determine at what point dues delinquency subjected a member to discharge; and, assuming that the Union was technically correct in securing Lockridge's discharge, whether it normally tolerated such delinquency and was really motivated by Lockridge's refusal to abide by the checkoff. The Board could well have found the facts differently than did the Idaho courts;<sup>10</sup> and, even if it did not, it probably would have ordered a different remedy—*e.g.*, reinstatement, with more or less back pay. Or the Board might have refused to reach the merits of the controversy, because Lock-

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<sup>10</sup> Cf. the disposition of Day's charge (n. 4, *supra*). However, as the district court recognized (*supra*, p. 8), the circumstance that the Regional Director found insufficient evidence of an unfair labor practice in Day's case does not mean that the same conclusion would have been reached respecting Lockridge. But, even if the refusal to issue an unfair labor practice complaint on Day's charge foreshadowed the same result for Lockridge (see *Opp. to Pet. for Cert.* 15), this merely shows that the conduct complained of was not unlawful under the National Labor Relations Act.

ridge had not acted with the dispatch required by Section 10(b) of the Act (see n. 5, *supra*). Accordingly, here, as in *Garmon*, the State court has regulated conduct which is "so plainly within the central aim of federal regulation" that potential interference with the federal regulatory scheme can be avoided only by requiring the State court to defer "to the exclusive primary competence of the Board." 359 U.S. at 244, 245.

#### CONCLUSION

The judgment of the Supreme Court of Idaho should be reversed, and the case should be remanded with instructions to dismiss the complaint for want of jurisdiction.

Respectfully submitted.

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JUNE 1970.



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

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No. 1072

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY  
AND MOTOR COACH EMPLOYEES OF AMERICA, an International  
Labor Union; and NORTHWEST DIVISION 1055 of the AMAL-  
GAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division  
of the International Union, *Petitioners,*

v.

WILSON P. LOCKBRIDGE

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF IDAHO

---

BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE

---

This brief *amicus* in support of the position of the Petitioners is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

## INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty national and international labor organizations having a total membership of approximately thirteen million five hundred thousand working men and women. The issue in the instant case concerning the authority of a state court to hear a suit as to the validity of a discharge pursuant to a union security agreement, a matter within the central concern of §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, is of course of substantial practical moment to the labor movement. Nevertheless, it is not, all other things being equal, one which would have motivated the Federation to take the liberty of imposing on this Court. For as the Petitioners demonstrate, with great clarity and force, the decision below is plainly contrary to this Court's decision in *Local 100 Plumbers v. Borden*, 373 U.S. 690 (1964).

Under the surface of the instant case, however, there is an issue of wider legal ramifications. There are a number of limitations and exceptions to the exclusive primary jurisdiction of the NLRB as declared in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), in addition to the exception providing for state regulation of internal union affairs established by *Machinists v. Gonzales*, 356 U.S. 617 (1958). Each of these exceptions and limitations creates a potential for state interference with activity declared lawful by the Act. In general, as we show in detail at pp. 10-16, *infra*, this Court has evolved decisional rules which have minimized this potential by focusing "on the nature of the activities which the state has sought to regulate rather than on the method of regulation" *Garmon*, 359 U.S. at 243. The major exception has been *Gonzales*, which even as interpreted in *Borden*, directs attention to the legal labels utilized by the state rather than the

nature of the conduct in question. As the instant case demonstrates, the *Gonzales* method of distinguishing between the area preempted by the Board and the area open to the states has an inherent potential for instability. We therefore take this occasion to urge that the line between internal union affairs and union activity regulated by the Act be restated in terms of the analysis suggested by *Garmon*. This would result in preserving the states' full right to regulate union activity against membership rights, which is of "merely peripheral concern" under the Act, *Garmon*, 359 U.S. at 243, but would bar the states from regulating union activity against job rights, whether such regulation is straightforward or under the rubric of "filling out" the state remedy, *Gonzales*, 356 U.S. at 619, since union activity against an individual's job rights is at the heart of the federal scheme of regulation, see, *Radio Officers Union v. NLRB*, 347 U.S. 17, 40-42 (1954).

### **ARGUMENT**

#### **STATE COURT JURISDICTION TO DECIDE THE LEGALITY OF A DISCHARGE PURSUANT TO A UNION SECURITY CLAUSE IS PREEMPTED BY THE EXCLUSIVE PRIMARY JURISDICTION OF THE NLRB**

In the instant case the Union secured the discharge of Wilson P. Lockridge as a Greyhound bus driver on the ground that he had forfeited his good standing membership in the Union by late payment of dues and was therefore subject to termination under the union security clause in the applicable collective agreement (A. 90-92). Lockridge did not file a charge with the National Labor Relations Board; instead he sued in the Idaho state courts. The basic allegation in his complaint was that the Union had deprived him "of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to

him and would accrue to him by reason of his employment, seniority and experience . . ."; and the sole relief sought was monetary damages measured by his lost employment earnings and benefits (A. 46-48). The question presented is whether the Idaho courts acted properly by exercising jurisdiction over Lockridge's claim, thereby rejecting the Union's argument that this suit is within the exclusive primary jurisdiction of the NLRB.

1. "In [1947] Congress undertook pervasive regulation of union security agreements" in §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 61 Stat. 140, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, *Local 1625 Retail Clerks v. Schermerhorn*, 375 U.S. 96, 100 (1963). The rule, relevant to the instant case, established by these provisions, is that a discharge pursuant to a union security arrangement is proper if it is based on a failure to "tender periodic dues . . . uniformly required as a condition of retaining [union] membership" and that:

"Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues or fees. . . . Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned" *Radio Officers Union v. NLRB*, 347 U.S. 17, 42 (1954)

See also, *e.g.*, *Frigidaire Local 801 IUE v. NLRB*, 307 F.2d 679, 684 (C.A. D.C. Cir., 1962) *certiorari denied*, 371 U.S. 961; *Local 545 IUOE*, 161 NLRB 1114, 1119 (1966); *NLRB v. Local 182 Teamsters*, 401 F.2d 509 (C.A. 2nd Cir., 1968), *certiorari denied*, 394 U.S. 904. As a matter of necessity, the implementation of this rule turns on both the language of the applicable union security clause and of the union rules and practices as to the financial require-

ments of retaining membership. And the Board, in carrying out its responsibility therefore interprets internal union rules as a matter of course, *e.g. Local 703 Laborers*, 181 NLRB No. 140, 73 LRRM 1553 (1970); *NLRB v. Local 333 NMU*, 417 F.2d 865 (C.A. 2nd Cir., 1969).

In sum, the Act regulates all discharges based on union security agreements; it authorizes those based solely on a failure to tender periodic dues, and forbids all others. Any employee with any complaint whatsoever concerning an illegal discharge pursuant to a union security clause has clear access to the Board's processes. On the other hand, in light of the proviso to § 8(a) (3) it is beyond the authority of any tribunal to hold a union or an employer liable for a discharge pursuant to a valid union security clause based solely on a failure to maintain good standing membership. Thus in this area there is no middle ground. The Act plainly occupies the entire field.

The establishment of the exact perimeters of the preemptive effects of the NLRA has occasioned much travail. The process of "litigating elucidation" *Machinists v. Gonzales*, 356 U.S. 617, 619 (1958), caused by the "Delphic nature. . . [of] the statutory implications concerning what has been taken from the States and what has been left to them," *ibid.*, has not pretermitted controversy, see, *e.g.*, *Local 1416 ILA v. Ariadne Shipping Co.*, 397 U.S. 195 (1970). As is frequently true, the existence of a measure of disagreement at the periphery has tended to obscure the fact that the basic decisions of this Court have articulated at least one central principle of the broadest acceptance—that the states cannot lay hold of any class of conduct the Board is empowered to regulate where there is a possibility that the state might condemn that which the Board could exonerate. At this late date there is, we believe, no need for a lengthy demonstration of the validity of the foregoing proposition by tracing the evolution of

the theory of the Board's exclusive primary jurisdiction from *Garner v. Local 776 Teamsters*, 346 U.S. 485 (1953) through *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957) to *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). It is sufficient that there was unanimity both in *Garner* and *Garmon* that the preclusion of the possibility of conflict between federal and state law is central to preemption. Thus, without dissent the *Garner* opinion emphasized (346 U.S. at 489-490):

"It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, [and] to issue its own complaint against respondents . . ."

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The definitive statement of the exclusive primary jurisdiction doctrine is, of course, that by Mr. Justice Frankfurter for five members of the Court in *Garmon*; and that

majority opinion likewise stressed the theme of possible conflict (359 U.S. at 244):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes."

While not all of Mr. Justice Frankfurters' reasoning commend itself to the entire Court there was no dissent from the proposition that the state court lacked jurisdiction in the circumstances there presented. For Mr. Justice Harlan concurring, stated (359 U.S. at 249-250):

"I concur in the result upon the narrow ground that the Unions' activities for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act, and that therefore state action is precluded until the National Labor Relations Board has made a contrary determination respecting such activities. . . . The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power."



It is beyond dispute that the Idaho courts assertion of jurisdiction in the instant case and the finding that the Union's actions were unlawful create a potential conflict with the Board's regime. There was no impediment to the filing of a Labor Board charge by Lockridge.<sup>1</sup> The Act does not merely regulate union security agreements; it gives unions the right to insist on discharges for the failure to maintain good standing union membership and it interdicts discharges pursuant to such clauses on any other ground. And Lockridge's claim is precisely that the Union had transgressed this limitation and wrongfully procured his discharge. The Union has continuously maintained that its action was entirely proper as a matter of federal law. Under the principles universally agreed upon in *Garmon* the exclusive primary jurisdiction to resolve that controversy rests in the Board pursuant to the procedures set out in § 10 of the Act.

At the time the Union sought Lockridge's discharge, it also sought the discharge of Greyhound driver Elmer J. Day for failure to maintain his good standing membership. Day utilized the Board's procedures. He filed a charge. After a complete investigation, and despite the fact that the law is that a union secured discharge for dues delinquency is presumptively a violation and the union must show that the discharge was in fact predicated on a proper interpretation of a valid union security clause, e.g., *Local 545 IUOE*, 161 NLRB at 1119, the Board's Re-

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<sup>1</sup> If Lockridge had filed a charge and the Board had found for him it could, of course, have awarded him reinstatement with lost seniority, and back pay with interest. It would also appear that it is within the Board's power to order reinstatement to union membership, see, *NLRB v Marine & Shipbuilding Union*, 391 U.S. 418 (1968). Thus, while *Gonzales'* assumption that the Board cannot "restore union rights", 356 U.S. at 620, is in our view the better reading of the Act, it has not proved a correct prophecy as to the direction the law has taken.

gional Director dismissed Day's charge because "there was insufficient evidence of violation" (A. 14). As the Oregon courts recognized, *Day v. Northwest Division 1055, Motor Coach Employees*, 238 Ore. 624, 389 P.2d 42 (1964), *certiorari denied*, 379 U.S. 878, the least the Board's handling of Day's case shows is that the states do not have the power to act since the character of the Union's "activity [has not been defined] with unclouded legal significance" *Garmon*, 359 U.S. at 246. Indeed, in light of the nature of the law which governs the unfair labor practice charged by Day, pp. 4-5, 8, *supra*, and this Court's opinion in *Hanna Mining Co. v. District 2 MEBA*, 382 U.S. 181 (1965), holding that a ruling by the Board's General Counsel can be treated as equivalent to a Board decision when its legal significance is clear, it may fairly be said that the proper conclusion is that the disposition of Day's case shows that the Union's actions were proper. For if the discharge was not an unfair labor practice it was authorized as a matter of federal law. Whether this aspect of *Hanna Mining* is pertinent here or not it is plain that refusals to issue complaints are part and parcel of the overall scheme enacted by Congress and as *Garmon* properly recognizes such a refusal does not open the doors to the state courts.

The course followed by the Idaho courts here threatens the entire structure that Congress has erected to deal with alleged unfair labor practices. Day's charge was dismissed before Lockridge acted. Thus a rational man in Lockridge's position would know that his chances of success before the Board were limited. His inclination, and indeed the inclination of anyone who has reason to believe that his claim cuts into activity sanctioned by the Act is to shop for a more hospitable forum. To the extent that the state courts facilitate implementation of that inclination, they undermine:

"the unifying consideration of [this Court's] decisions which has been regard to the fact that Congress

has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242.

2. The Idaho courts (A. 90) rested their jurisdiction on this Court's decision in *Gonzales*, 356 U.S. at 618, holding that the states may hear suits in which the "crux of the claim" is an allegedly wrongful deprivation of union membership. As the Union demonstrates the complete answer to this view is that here, as in *Local 100 Plumbers v. Borden*, 373 U.S. 690, 697 (1964), the state lacked jurisdiction because the "crux of the action (*Gonzales*, 356 U.S. at 618) concerned [Lockridge's] employment relations." We fully agree that *Borden* requires reversal. While there is thus no need to go beyond present law to reach the correct result here, the instant case demonstrates that *Gonzales*, even as limited by *Borden*, provides a wide avenue for state courts to enter the area preempted by the Act. We therefore suggest a reformulation of the governing rule in terms which will more effectively safeguard what all the Justices in *Garmon* agreed to be the major purpose of the Board's exclusive primary jurisdiction—the prevention of potential conflicts with federal substantive policy.

There are a number of limitations and exceptions to the proposition that the states must defer to the Board in the first instance.<sup>2</sup> Thus this Court's decisions indicate that in addition to internal union affairs, the states are free as to violence, *International Union UAW v. Russell*,

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<sup>2</sup> Lockridge has not argued that there is a federal basis for the Idaho court's jurisdiction here. Thus we do not deal with the distinct questions which arise from the application of *Garmon* to suits predicated on an independent federal jurisdictional base: §301, §303, the Antitrust laws or the duty of fair representation; see, *Smith v. Evening News*, 371 U.S. 195 (1962); *Meatcutters v. Jewel Tea*, 381 U.S. 676, 684-688 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967).

356 U.S. 634 (1958); union organizational activity directed at foreign flag seamen, *Inces S.S. Co. v. Maritime Workers*, 372 U.S. 24 (1963); the enforcement of right to work laws, *Schermerhorn*, 375 U.S. at 102; the use of economic pressure in connection with representation disputes involving supervisors, *Hanna Mining*, 382 U.S. at 186-190, and "libel issued with knowledge of its falsity, or reckless disregard of whether it was true or false," *Linn v. Plant Guards*, 383 U.S. 53, 61 (1966).

In every one of the above noted instances there is an interface between the class of conduct open to state regulation and activity protected by the Act. And in every instance, except that relating to state regulation of internal union affairs, this Court has been astute to erect and maintain clear lines delimiting the area open to the states precisely to preclude the possibility of conflict—as we shall now demonstrate.

In *Youngdahl v. Rainfair*, 355 U.S. 131 (1957), the Arkansas courts enjoined threats and intimidation by strikers directed at strikebreakers and all picketing and patrolling of the struck plant as well. The Court upheld the first portion of the injunction but struck down the latter prohibition (355 U.S. at 139):

"Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners. The picketing proper as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed."

Thus the state court was not allowed to utilize its juris-

diction to enjoin violence as a basis for entering the pre-empted area; it was required to sever with surgical precision the conduct open to its regulation from the conduct subject to exclusive Board regulation. As this Court noted in reaffirming the principle enunciated in *Youngdahl*:

"This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation . . .

"Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree.

"Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic peace." *Mine Workers v. Gibbs*, 383 U.S. 715, 729-730 (1966).

Perhaps the most striking example of the Court's concern to prevent the states from interfering with overriding national law is the holding in *Schermerhorn* that the states may not, in enforcing their "right-to-work" laws, regulate peaceful picketing alleged to have an object of securing a union security agreement (375 U.S. at 105):

"As a result of §14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field . . . picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain (Local Union 429

v. Farnsworth & Chambers Co., 353 U.S. 969, and Local No. 438 v. Curry, 371 U.S. 542), because state power recognized by §14(b), begins *only with actual negotiation and execution of the type of agreement described by §14(b)*. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon." (emphasis in original)

The result of *Schermerhorn* is that the states are not allowed to stray beyond the exact confines set by §14(b) even when they claim that a wider jurisdiction is necessary to prevent conduct directed toward a goal illegal under a law the state is expressly authorized to enforce.

In terms of the point being pursued here the decision in *Hanna Mining* must be taken against the background provided by *MEBA v. Interlake Co.*, 370 U.S. 173 (1962). The union conduct in both was essentially the same. In *Interlake*, state jurisdiction was denied since the Board had not ruled on the jurisdictional questions presented: "While the Board's decision is not the last word it must assuredly be the first." 370 U.S. at 185, for:

"The Minnesota courts determined . . . that those whom the petitioners represented and sought to enlist were 'supervisors,' that consequently neither of the petitioners was a 'labor organization,' and therefore that nothing in the Garmon doctrine precluded a state court from assuming jurisdiction.

"It is the petitioners' contention that the issue to be determined in this case is not whether the state courts correctly decided their 'labor organization' status, but whether the state courts were free to finally decide that issue at all. The petitioners contend that the principles of the Garmon decision confined the state court to deciding only whether the evidence in this case was sufficient to show that either of them was arguably a 'labor organization' within the contemplation of §8(b). We agree . . . analysis of the problem makes clear that the process of defining the term

'labor organization' is one which may often require the full range of Board competence." (370 U.S. at 177-178).

In *Hanna Mining*, on the other hand, the complaining party had pursued its option of going to the Board with the result that the Court was satisfied that the:

"central interests served by the Garmon doctrine are not endangered by a state injunction when, in an instance such as this, the Board has established that the workers sought to be organized are outside the regime of the Act. Cf. *Inces S.S. Co. v. Maritime Workers*, 372 U.S. 24. Most importantly, the Board's decision on the supervisory question determines, as we have already shown, that none of the conduct is arguably protected nor does it fall in some middle range impliedly withdrawn from state control. Consequently, there is wholly absent the greatest threat against which the Garmon doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." (382 U.S. at 192-193).

The recent *Ariadne* case presented a situation comparable to that faced in *Interlake*. The Florida courts relying on *Inces* enjoined picketing directed at longshoremen servicing a foreign flag vessel. This Court rejected this attempt to widen the foreign flag exception to Board jurisdiction (397 U.S. at 200-201):

"The critical inquiry then is whether the longshore activities of such American residents were within the 'maritime operations of foreign-flag ships' which *McCulloch*, *Inces*, and *Benz* found to be beyond the scope of the Act. . . . We therefore find that these longshore operations were in 'commerce' within the meaning of §2(6), and thus might have been subject to the regulatory power of the National Labor Relations Board.

"The jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities that are 'arguably subject' to regulation under §7 or §8 of the Act. *San Diego Building Trades Council v. Gar-*



mon, 359 U.S. 236, 245 (1959). The activities of petitioner in this case met that test. The union's peaceful primary picketing to protest wage rates below established area standards arguably constituted protected activity under §7."<sup>3</sup>

Finally, in *Linn* the Court, while declaring malicious libel open to state regulation, took pains to circumscribe that state jurisdiction in order to preclude conflict:

"But it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

"The standards enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), are adopted by analogy, rather than compulsion. We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel action, and unwar-

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<sup>3</sup> The concurring opinion in *Ariadne*, 397 U.S. at 201-202, takes the view that the state's jurisdiction turned on the legality of the union picketing under federal law. As indicated above, we believe that resolution of the question presented in that case turned on the scope of the jurisdictional limitation stated in *Ingres* and not on the nature of the union conduct.

ranted intrusion upon free discussion envisioned by the Act." (383 U.S. at 64-65)

3. In the foregoing cases the Court confronted the fact that lines must be drawn between the preempted area and the area left open to the states. In each instance this problem was met with an appreciation of the insight that:

"Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Garmon*, 359 U.S. at 243.

And the success this Court has achieved in drawing workable lines reflects the fact that "the nature of the activity" in question provides a reliable guide to decision.

The approach in *Gonzales* on the other hand focuses on the legal labels the state utilizes to characterize union activity. The states' scope of regulation depends on how the plaintiff and the state court define the "crux of the claim," 359 U.S. at 618. If the crux of the claim relates to membership rights the states may "fill out" the remedy, apparently without regard to the extent to which its action invades the preempted area, or conflicts with a judgement the Board would reach, 359 U.S. at 619-622. Under *Borden*, however, if the crux of the claim is within the Board's jurisdiction the state is precluded, 373 U.S. at 696-698.

Because of the nature of the relevant federal substantive law *Gonzales* puts a heavy emphasis on artful pleading and opinion writing. The scope and meaning of the internal union rules governing the maintenance of good standing

membership are critical in any §8(b)(2) case. Board litigation in this field pre-supposes a dispute about membership, see, pp. 4-5, *supra*. Thus so long as attention is focused on the nature of the legal theory presented a §8(b)(2) case can always be transmuted into a case for state jurisdiction. For to some extent the legal materials relevant to the Board, acting within its proper sphere, and to the state court, acting within the area of regulation reserved to it, overlap. Thus the state court in order to bolster its decision here went to great length to emphasize the membership aspects of the case despite the fact that Lockridge did not even seek to regain his membership (A. 99). And in a case such as *Green v. Folks*, 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961), the court dismissed an employee's action against his employer and union to recover damages for an allegedly unlawful discharge stemming from an invalid suspension from the union. The employee then turned around and sued the union on a theory of wrongful suspension, seeking reinstatement to membership and consequential damages for loss of wages. Citing *Gonzales*, the court accepted jurisdiction over this more artfully pleaded second action, 223 N.Y.S. 2d 287 (N.Y. Cty. 1961). Yet the major change in the substance of the suit was the dropping of the employer as a defendant.

Thus, the line of demarcation drawn in *Gonzales* is a shifting and uncertain one. The heavy costs of this are plain. There is a constant danger that the various state courts will condemn that which the Board would find lawful despite "the governing consideration . . . that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy," *Garmon*, 359 U.S. at 246. It is of equal importance that such decisions necessitate intervention by this Court on a case-by-case basis to preserve the federal right despite the fact that:

"The nature of the judicial process precludes an ad hoc

inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations." *Garmon* 359 U.S. at 242.

It might be that *Gonzales* would be defensible if it were impossible, under any circumstances, to ascertain a clear distinction between Board and state authority. But the opposite is true. In this area as in the others discussed in part 2, pp. 10-16, *supra*, a line based on the nature of the activity in question does produce sound and principled results. For Congress has drawn a precise line between the class of conduct of "merely peripheral concern of the" Act, *Garmon*, 359 U.S. at 243, marked out in *Gonzales*, and the class of conduct of central concern under §§8(b)(2) and 8(a)(3). *Gonzales* allows the states to regulate union activity directed against membership rights, 356 U.S. at 619. "The policy of the Act is to insulate employees' jobs from their organizational rights" *Radio Officers*, 347 U.S. at 40. The focus of the Act is union activity directed against job rights. Thus the key to delimiting the preempted area is that federal law and not state law regulates union activity against an individual's employment status even though the legality of the union's conduct turns on the resolution of questions relating to the meaning and effect of the union's internal rules.

A union which deprives an individual of membership sometimes takes action also against his job rights. The latter may be a consequence of the former. Nevertheless these two forms of activity never fuse into one. The distinction between the act of expelling, suspending or otherwise disciplining a union member as a member, and the

separate act of securing his discharge, as here, or refusing to refer him to work, as in *Borden*, is manifest. And as this Court recognized in *Radio Officers* it is the distinction upon which Congress acted. The fact that these two classes of conduct may be interrelated to some extent should not, therefore create any problems in practice. For example, in *Youngdahl v. Rainfair*, the state's position was that preempted activity (peaceful picketing) and activity open to state regulation (threats, verbal abuse, etc.) were inextricably intertwined, and in *Schermerhorn* the argument was that the preempted action (peaceful picketing) was designed to force other action (the signing of a union security agreement) interdicted by state law. These arguments for authority to fill out the states' power even though this meant regulation of conduct within the Board's area of special concern were rejected.

It follows therefore that the Idaho court's assumption that its admitted jurisdiction to regulate a membership dispute invested it with power to regulate a discharge pursuant to a union security clause is analytically unsound. It is simply the converse of the proposition rejected in *Schermerhorn*. Here the theory is that the state should have the power to regulate conduct which can be labeled the "effect" (the discharge) since it has the power to regulate the conduct which is the "cause" (the loss of membership). In *Schermerhorn* the theory was that since the state had conceded power to regulate the "effect" (the union security clause), it should have power to regulate the "cause" (the picketing). In either case the objection to this line of reasoning is the same. Extension of state jurisdiction no matter how it is justified would disregard the point that "Congress has entrusted administration for the labor policy to a centralized administrative agency . . ." *Garmon*, 359 U.S. at 242.

In sum, we suggest that the Act leaves the states free to

regulate union activity directed at membership rights, but that the states are absolutely precluded by the Board's exclusive primary jurisdiction from regulating union activity designed to affect job rights, without regard to whether this regulation is termed an ancillary remedy or is frankly acknowledged for what it is—an attempt to enter the area preempted by the Act.

### CONCLUSION

For the above stated reasons, as well as those presented by the Petitioners, the decision below should be reversed.

Respectfully submitted,

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June, 1970





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**Supreme Court of the United States**

**OCTOBER TERM, 1970**

**No. 76**

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF  
AMERICA, an INTERNATIONAL LABOR UNION; and  
NORTHWEST DIVISION 1055 of the AMALGAMATED  
ASSOCIATION OF STREET, ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, a Re-  
gional Division of the International Union,  
Petitioners,**

**v.**

**WILSON P. LOCKRIDGE, Respondent.**

**On a Writ of Certiorari to the Supreme Court of the  
State of Idaho**

**BRIEF OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**  
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No. 76

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AMALCAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF  
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*Petitioners,*

v.

WILSON P. LOCKRIDGE, *Respondent*

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On a Writ of Certiorari to the Supreme Court of the  
State of Idaho

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**BRIEF OF RESPONDENT**

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**QUESTIONS PRESENTED**

1. Does a state court have sole or concurrent juris-  
diction over an action by a union member against his  
union for reinstatement and damages where his  
expulsion from union membership was in violation  
of the contract embodied in the union constitution?
2. Does a state court have jurisdiction under Sec-  
tion 301 of the National Labor Relations Act, 29

USCA 185, of a violation of a collective bargaining agreement even though the conduct involved in that violation might "arguably" also be an unfair labor practice within the jurisdiction of the National Labor Relations Board?

3. Does a state court have jurisdiction of a suit by a union member for relief from the conduct of a union constituting a breach of its duty of fair representation even though such conduct might also "arguably" constitute an unfair labor practice under the jurisdiction of the National Labor Relations Board?

4. Should not this court continue to recognize that the "general rule" of *Garmon*, 359 U.S. 236, prohibiting state court jurisdiction over conduct which is "arguably" either protected or prohibited by Sections 7 or 8 of the National Labor Relations Act is subject to congressionally carved exceptions and judicially recognized penumbral areas where the activity involved is but a mere peripheral concern of the Act or touches on matters deeply rooted in local interest and responsibility and jurisdiction of the courts is traditional?

## STATEMENT OF THE CASE

From about May 16, 1943, to November 2, 1959, when the act giving rise to this controversy occurred, Respondent was a member of Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("union") and employed as a bus driver by Western Greyhound Lines or its predecessors.

Section 91 of the union constitution (Pl. Ex. 34; R-10) provided that when a member allowed his dues delinquency to run over the last day of the *second*



month without payment he suspended himself from membership in the union. Section 91 additionally specified that where agreement with an employing company provided that the members must be in *continuous good financial standing*, a member in arrears one month *may* be suspended from membership.

Section 3 of contract B, the collective bargaining agreement between the union and Greyhound pertinent to this action (Pl. Ex. 35; R-10)<sup>1/</sup> required only that employees become and remain *members*. It did not require that they *maintain membership in good standing* as did other bargaining agreements.<sup>2/</sup> (A.88)

As of October 22, 1959, Respondent had not yet paid his dues for September or October. C. A. Bankhead, Treasurer and Financial Secretary of Division 1055 of the union, wrote to Respondent calling to his attention the fact that his September dues had been returned to him by Greyhound and that his dues for the month of *September* must be paid by October 28. A. 80, 81. Respondent paid his September dues and received a receipt therefor from Bankhead dated October 26. A. 73, 82. His dues for October, however, remained unpaid and on November 2 Bankhead advised

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<sup>1/</sup> "3. Membership in and Recognition of the Association, Grievances and Arbitration: (a) All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and *shall remain members* as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY." (Emphasis supplied)

<sup>2/</sup> Pl. Ex. 35 consists of two contracts: Contract B on white paper and Contract C on yellow paper. The agreement pertinent to Respondent is Contract B, the white portion of the exhibit. Contract C, the yellow portion, applied elsewhere and required that employees "*maintain such membership in good standing*." (p. 75) A. 59, 73, 74. (Emphasis supplied)

Greyhound that Respondent and one Elmer J. Day (in a like situation) had suspended themselves from membership in the union and requested their removal from employment in compliance with Section 3 of Contract B. A. 82. Respondent was thereupon terminated from his employment by Greyhound. A. 85, 86. The *sole ground* for the suspension of Respondent from membership in the union was failure to tender periodic dues. A. 59, 78.

Elmer Day filed an unfair labor practice charge with the National Labor Relations Board but his petition was rejected by the Regional Director of the Board on the ground there was insufficient evidence of violation of the National Labor Relations Act. There was no explanation of this determination or reasons given for the conclusions reached. A. 13, 14. He thereafter filed suit against the union, Bankhead and others who were subsequently removed from the case. Judgment in his favor was reversed by the Supreme Court of Oregon<sup>3/</sup> on a misconstruction of the pre-emption doctrine (not without dissent) and this court denied certiorari (379 U.S. 878).

Following rejection of Day's charge by the National Labor Relations Board, Respondent filed the instant case in state court. Respondent originally named Greyhound as a joint defendant but being unable to unearth any proof that Greyhound knew of the misrepresentation by the union that Respondent's membership had been properly terminated, he filed an amended complaint in which only the Petitioners were defendants (A. 14-22) and subsequently filed a second amended complaint (A. 43-48) asserting in count one

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<sup>3/</sup> *Day vs. Northwest Division 1055, et al*, 389 Pac. 2d 42.

a tortious suspension from membership in the union with resulting discharge and loss of employment and in count two, violation of the union constitution or breach of contract with like results. It was the second amended complaint and answer thereto upon which the case went to trial.

During the course of this extended litigation, Petitioners raised the defense that Respondent was in truth subject to suspension from membership in the union in accordance with the constitution and bargaining agreement. This contention was rejected by the trial court, holding that Section 91 of the constitution and the bargaining agreement were clear; that the bargaining agreement required only that Respondent remain a *member* of the union, not that he *maintain membership in good standing* and, therefore, Respondent had until the last day of the second month of delinquency or until the end of November before being subject to suspension for failure to tender periodic dues. A. 36, 64. Petitioners' argument was also rejected by the Idaho Supreme Court on several grounds, first, by fully agreeing with the interpretation of the lower court and, secondly, that Petitioners had not assigned this ruling and finding of the lower court as error on the appeal. A. 97. In fact, none of the trial court's findings of fact were assigned as error on appeal to the Idaho Supreme Court. A. 106, 107.

It was the conclusion of the lower court, in awarding judgment to Respondent, that the constitution and bylaws of the international union constituted a contract between the union and the members and that in suspending Respondent from membership in the union for delinquency in dues, when his delinquency was not such as to subject him to suspension and con-

trary to all custom within the union, the union violated the contract between the union and Respondent.<sup>4/</sup>

Though Respondent's second amended complaint contained two counts, one sounding in tort and the other for breach of contract, judgment was awarded Respondent for breach of contract only. While Respondent had not specifically sought such a remedy (in addition to damages, he sought general equitable relief) the court concluded that he was entitled to all relief warranted by the evidence and ordered him reinstated to union membership. A. 66. This is in accordance with the Idaho Rules of Civil Procedure.<sup>5/</sup> The Idaho Supreme Court determined that this was the primary relief to which he was entitled and damages were a secondary consideration. A. 100.

The issue presented by Petitioners on appeal to the Idaho Supreme Court was whether Respondent's action in the state court was pre-empted by federal law;

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4/ "That the Constitution and By-Laws of the International Union constitute a contract between the union and the members thereof and in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and contrary to all custom within Division 1055, defendants, whose officers and agents acted in concert, violated said contract." Conclusion of Law VI. A. 65.

Also: "The constitution and bylaws of the defendant union and the granting and acceptance of membership, constituted a contract between the plaintiff and defendant. 7 CJS Associations § 11b." *Lockridge v. Amalgamated, etc.*, 84 Idaho 201, 369 Pac. 2d 1006. A. 28.

5/ "\*\*\*Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), Idaho Rules of Civil Procedure. Also, *Burke Land & Livestock Co. vs. Wells, Fargo & Co.*, 7 Idaho 42, 60 Pac. 87; *Dover Lbr. Co. vs. Case*, 31 Idaho 276, 170 Pac. 108; *Swanstrom vs. Bell*, 67 Idaho 554, 186 Pac. 2d 876; *Vaneck vs. Foster*, 74 Idaho 532, 263 Pac. 2d 997. Rule 54(c), Federal Rules of Civil Procedure, is identical.

whether the matter was one for the sole cognizance of the National Labor Relations Board. No findings of the trial court were assigned as error and Petitioners must now be bound thereby. Respondent cross-appealed on several grounds concerning damages and also complained that the lower court had failed to restore him to membership in the union with commensurate restoration of seniority. The Idaho Supreme Court rejected his contentions concerning damages but did order the judgment modified to include restoration of seniority within the union.\* A. 109-111.

## SUMMARY OF ARGUMENT

State court jurisdiction is not pre-empted in this case for three basic reasons:

A. In wrongfully suspending Respondent from membership in the union, Petitioners violated the constitution which itself constitutes a contract between the union and its members and Petitioners are therefore answerable for breach of contract in a state court. This suspension involved an "internal union matter," at most of mere peripheral concern to the Taft-Hartley Act, and the court in ordering reinstatement to union membership, afforded a remedy not available through the National Labor Relations Board. Actions for breach of contract of this nature are within the traditional jurisdiction of the courts and touch interests deeply rooted in local feeling and responsibility.

B. The union breached or motivated the breach of the bargaining agreement between the union and Greyhound for which it is answerable in the courts

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\*/ Membership seniority is recognized by the union constitution: Those longest in service have the greatest seniority. (Sections 160-163, Union Constitution, Pl. Ex. 34; R-10).

under the plain language of Section 301, National Labor Relations Act (29 USCA 185) and Respondent has a remedy in the courts even though the union conduct is or might "arguably" be an unfair labor practice.

C. As the exclusive agent of Respondent on all matters pertaining to his employment, the union wrongfully suspended Respondent from membership, caused a breach of the bargaining agreement and his loss of employment, and violated its duty of fair representation.

## ARGUMENT

### 1. THE UNION CONDUCT CONSTITUTED A BREACH OF CONTRACT BETWEEN THE UNION AND RESPONDENT.

It is the law of Idaho and most other jurisdictions that the union constitution and bylaws constitute a contract between the union and its individual members<sup>7/</sup> and this court has recognized that "this contractual conception of the relations between the member and his union widely prevails in this country."<sup>8/</sup> In suspending Respondent from membership contrary to the provisions of the constitution, the union breached this contract.

The wrongs suffered by Respondent had their origin in this wrongful suspension from union membership. Having breached this contract, the union induced and was a party to a breach of the bargaining agreement by misrepresenting Respondent's membership status

<sup>7/</sup> *Lockridge vs. Amalgamated Association, etc.*, 84 Idaho 201, 369 Pac. 2d 1006.

<sup>8/</sup> *International Association of Machinists vs. Gonzales*, 356 U.S. 617, 2 L. Ed. 2d 1018, 78 S. Ct. 923 (*Gonzales*).

to Greyhound and requesting Respondent's discharge.

The loss of employment, which followed the suspension from membership, was the result of this union conduct and formed the basis for ascertaining damages flowing from the primary act of breaching the contract.

The facts here are closely akin to those existing in *Gonzales*. Therein, Gonzales was wrongfully expelled from his union. As a result of such expulsion he was denied employment and thereupon brought suit against the union for breach of contract, seeking restoration of his membership, damages for the loss of wages which followed his expulsion and damages for mental suffering. Judgment in his favor was affirmed by this court.

“\*\*\*In the judgment of the Board, expulsion from a union, taken in connection with other circumstances established in a particular case, might constitute an attempt to cause an employer to ‘discriminate against an employee with respect to whom membership in such organization has been denied or terminated *on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .*’ 61 Stat 141, 29 USC § 158(b) (2). But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b) (1) of the Act states that ‘this paragraph shall not impair the right of a labor organization to pre-



ascribe its own rules with respect to the acquisition or retention of membership therein . . . ' 61 Stat 141, 29 USC § 158(b) (1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' *Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See United Constr. Workers v. Laburnum Constr. Corp. 347 US 656, 98 L ed 1025, 74 S. Ct 833.*<sup>9/</sup> (Emphasis supplied)

Here, no circumstances were established for suspension other than failure to pay dues. It constituted the *sole ground* for suspension,<sup>10</sup> a finding not assigned as error on appeal to the Idaho Supreme Court.

Petitioners concede that it is not an unfair labor practice for a union to suspend a member and cause an employer to discriminate against him on the grounds of failure to tender periodic dues (Section 8(b)(2), National Labor Relations Act; 29 USC 158(b)(2)). They assert, however, that this is a "protected" activity. They postulate that there are only two types of activities, those protected and those

<sup>9/</sup> *International Association of Machinists vs. Gonzales*, Note 8, *supra*.

<sup>10/</sup> A. 59, 78.

prohibited and if an act is not prohibited by Section 8, it must, a fortiori, be protected. With this hypothesis Respondent disagrees.

Prohibited activities are outlined in Section 8 of the Act. Those delineated in Section 8(a) refer to activities prohibited of employers while those specified in Section 8(b) are activities prohibited of a labor organization. Section 7 refers to protected activities of "employees"—individuals. The union cannot claim that its conduct here falls under the mantle of protected activities of employees under Section 7. Not only is the union not an "employee" but its conduct in the instant case does not constitute one of the activities protected. The conclusion that if its conduct is not prohibited by Section 8(b) it must of necessity be protected is without merit. If the union conduct is not proscribed by Section 8(b) it constitutes conduct outside the scope of the Act and not regulated thereby.

Petitioners then assert that since they were in error in their interpretation of the union constitution and the bargaining agreement and Respondent was not in fact so delinquent in his dues as to be subject to suspension with resulting loss of employment, he must have been suspended from the union for some reason other than failure to tender dues and this would constitute an unfair labor practice. This is a spurious argument."<sup>1</sup>

There are two factual differences between *Gonzales*

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<sup>11</sup>/ By like delusive reasoning, Petitioners would urge that if a goose hunter killed a swan, erroneously thinking it to be a goose, a fortiori, since the bird wasn't actually a goose, the hunter must have killed it for some reason other than he thought it was a goose. Despite the error of the hunter, the fact remains that his *sole* reason for killing the bird was that he thought it was a goose.

and the instant case. First, Respondent here did not specifically pray for restoration of union membership as part of his relief. Nevertheless, he prayed for all equitable relief, and,

"The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief. His prayer for equitable relief was framed in general terms and this court concludes that in this case or any other within the narrow area where we can assert jurisdiction to relieve wrongfully denied membership, the primary relief which can and shall be granted is restoration of union membership. Damages, if any, are a secondary consideration and shall be limited to compensation for damage suffered until such time as membership is restored."<sup>12/</sup>

This conforms to the law and Rules of Civil Procedure prevailing in Idaho<sup>13/</sup> (and in the federal courts) and to attempt to distinguish *Gonzales* on the grounds of relief sought as opposed to relief granted is nebulous indeed. Additionally,

"The possibility of conflict from the courts awarding damages in the present case is no greater than from its order that Respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of the juris-

<sup>12/</sup> Decision of the Idaho Supreme Court. A. 99, 100.

<sup>13/</sup> Note 5, *supra*.

diction to vindicate the personal rights of an ousted union member."<sup>14/</sup>

Secondly, Respondent lost his employment because of a union shop clause in the collective bargaining agreement whereas in *Gonzales* such an agreement did not exist and Gonzales was unable to obtain employment after expulsion from the union because of a refusal of the hiring hall to refer a nonunion member for work. While the hiring hall practices in *Gonzales* were of mere incidental concern, unlike *Borden*<sup>15/</sup> where the difficult and complex operations thereof were considered to be the "crux" of the case, it would seem that a determination in favor of state court jurisdiction in this case is even more compelling than it was in *Gonzales*.

There is no federal pre-emption in favor of union security clauses; in fact, contrary to assertions of Petitioners that a union security clause is one which Congress obviously regarded as at the heart of the National Labor Relations Act (Petitioners' brief, pp. 20, 51), Congress especially disclaimed any federal policy. Section 8(a)(3) carries the specific proviso "that nothing in this act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization \* \* \* to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or such agreement, whichever is the later, \* \* \*." Then to make its intent entirely clear, Congress added Section 14(b) which provides:

<sup>14/</sup> *International Association of Machinists vs. Gonzales*, Note 8, *supra*.

<sup>15/</sup> *Plumbers Union vs. Borden*, 373 U.S. 690, 10 L. Ed. 2d 638, 83 S. Ct. 1423 (*Borden*).

"Sec. 14(b). Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by State or territorial law."

Section 8(a) (3) "merely disclaims a national policy hostile to the closed shop or other forms of union security agreement."<sup>16/</sup> Section 14(b) "was included to forestall the inference that federal policy was to be exclusive" on this matter of union security agreements.<sup>17/</sup> A number of states have prohibited the union shop under the specific authorization given them by Congress. Idaho has not done so but its inaction in this regard detracts nothing from the fact that it, or any other state, can so act if it chooses, and that far from being at the very heart of the National Labor Relations Act, regulatory control of union security clauses has thus been divided between state and federal jurisdiction rather than being pre-empted. By these statutory enactments, Congress has disclaimed the assumption of exclusive federal control and has really done nothing more than proclaim that the federal policy is not hostile to union security clauses.

There is certainly less reason therefore to consider the instant case as pre-empted than *Gonzales* where a hiring hall was involved.

Petitioners urge that the general rule of *San Diego*

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<sup>16/</sup> *Algoma Plywood Co. vs. Wisconsin Board*, 336 U.S. 301, 314, 93 L. Ed. 691, 702, 69 S. Ct. 584.

<sup>17/</sup> *Retail Clerks vs. Schermerhorn*, 375 U.S. 96, 11 L. Ed. 2d 179, 84 S. Ct. 219.

*Bldg. Trades Council vs. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773, supported by *Plumbers Union vs. Borden*, 373 U.S. 690, 10 L. Ed. 2d 638, 83 S. Ct. 1423, and *Iron Workers vs. Perko*, 373 U.S. 71, 10 L. Ed. 2d. 646, 83 S. Ct. 1429, requires that state jurisdiction be relinquished here. Such is not the case. *Garmon* itself recognized that state regulation over a particular area of activity must give way only where such regulation threatened interference with the clearly indicated policy of industrial relations.

"However, due regard to the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Asso. of Machinists v. Gonzales*, 356 U.S. 617, 2 L. ed 2d 1018, 78 S. Ct. 923. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."<sup>18/</sup>

The *Garmon* rule is mischaracterized by Petitioners' statement that "conduct which is even arguably protected or prohibited under the act is pre-empted."<sup>19/</sup> Such a statement ignores the rationale for the rule, states only a portion of the rule and thereby blithely eliminates the existence of both statutory exceptions

<sup>18/</sup> *San Diego Bldg. Trades Council vs. Garmon*, supra.

<sup>19/</sup> Petitioners' brief, p. 16.

and the judicially recognized "penumbral area" in which certain types of conduct fall within the jurisdiction of state courts or the concurrent jurisdiction of the Board and the state courts.

In any case of potential concurrent jurisdiction, the primary inquiry is what effect, if any, state court action might have on clearly defined national policy of industrial relations. Petitioners have not addressed themselves to this question, preferring only the incantation of the "arguably subject" portion of the *Garmon* rule.

A consideration of the impact of the decision herein being reviewed on declared national policy of industrial relations is clarified by the *Garmon* rule. If there would be no effect, or only slight impact on national labor policy, then obviously the activity regulated would be only a "peripheral concern" of the act and state jurisdiction would not be pre-empted.

"But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the exertion of any such power has been expressly denied."<sup>20/</sup>

Neither *Borden* nor *Perko* are in hopeless conflict with *Gonzales*. While concededly the pre-emption doctrine probably reached its apogee in *Borden*, the predicate of the court's conclusion as to pre-emption was its prerequisite determination of the existence of a matter of national labor policy and the possibility of conflict therewith. In *Borden* the difficult and complex operation of union hiring halls did, in the opinion of

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<sup>20/</sup> *International Association of Machinists vs. Gonzales*, Note 8, *supra*.



the court, require that competence in adjusting such matters should be limited to a single expert federal agency. In *Perko*, the determinations of the difficult problem of employee status was, in the opinion of the court, "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the act as a whole."

In the instant case there exists no such pressing consideration of national policy. Here the fountain-head of the controversy involves a dispute between a union member and his union over matters of internal union policy. Respondent's loss of employment status which followed his expulsion from the union in accordance with the union security clause is not the overwhelming determinative force of this matter as Petitioners contend. It is apparent that this "internal union matter" involves no national labor policy or at most is of "mere peripheral concern" thereto.

Additionally, the *Garmon* rule contains another aspect which should not be ignored. It concedes that state courts should not be deprived of jurisdiction in cases involving conduct touching interests deeply rooted in local feeling and responsibility. This reflects this court's concern with the need to provide a remedy when a serious wrong has been charged. To preclude a state court from exerting its traditional jurisdiction in such a case on the remote possibility of some entanglement with the Board's enforcement of national policy "would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act."<sup>21/</sup>

This aspect of the *Garmon* rule has been followed

<sup>21/</sup> *International Association of Machinists vs. Gonzales*, Note 8, *supra*.

in *Linn vs. Plant Guards Local No. 114*, 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657, to afford state court relief to a management representative for a malicious libel by a union; in *Vaca vs. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903, to allow state court relief to a union member for his union's breach of its duty of fair representation; in *Food Employees vs. Logan Valley Plaza*, 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (recognized in *Taggart vs. Weinacker's*, 397 U.S. 223, 25 L. Ed. 2d 240, 90 S. Ct. \_\_\_\_), to allow state court prohibition of labor picketing which is obstructive to the use of private property. Moreover, it is beyond dispute that state courts reserve jurisdiction to restrain actual or threatened violence (*Youngdahl vs. Rainfair, Inc.*, 355 U.S. 131, 2 L. Ed. 2d 151, 78 S. Ct. 206, and *United Auto A. & A. I. W. vs. Wisconsin Empl. Rel. Bd.*, 351 U.S. 266, 100 L. Ed. 1162, 76 S. Ct. 794), or to grant compensation for the consequences, as defined by traditional law of torts, of conduct marked by violence and imminent threats to the public order (*Automobile Workers vs. Russell*, 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932; *United Constr. Workers vs. Laburnum Corp.*, 347 U.S. 656, 98 L. Ed. 1025, 74 S. Ct. 833).

Enforcement of the contractual relationship between Respondent and his union is one of the traditional areas of state concern within the purview of the *Garmon* rule. *Gonzales* has not been overruled and continues to be recognized as pinpointing one of the areas where state court jurisdiction prevails. (*Vaca vs. Sipes*, supra) Therein this court affirmed that the principle laid down in *Garmon* constituted a general rule only and was not to be applied in every instance:

"This pre-emption doctrine, however, has never

been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the N.L.R.B.”

Referring then to the various statutes specifically authorizing court actions, this court added (*Vaca vs. Sipes*, *supra*):

“In addition to these congressional exceptions, this Court has refused to hold state remedies preempted ‘where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . /or/ touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.’ *San Diego Building Trades Council v Garmon*, 359 US, at 243-244, 3 L ed 2d at 781, 782. See, e.g., *Linn v Plant Guard Workers*, 383 US 53, 15 L ed 2d 582, 86 S ct 657 (libel); *Automobile Workers v Russell*, 356 US 634, 2 L ed 2d 1018, 78 S Ct. 923 (violence); *International Assn. of Machinists v Gonzales*, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923 (wrongful expulsion from union membership); *Allen-Bradley Local v Wisconsin Employment Relations Board*, 315 US 740, 86 L ed 1154, 62 S Ct 820 (mass picketing). See also *Hanna Mining Co. v Marine Engineers Beneficial Assn.*, 382 US 181, 15 L ed 2d 254, 86 S Ct 327. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-emp federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the

administration of national labor policies of concurrent judicial and administrative remedies."

Thus, Petitioners and supporting amici urge blind adherence to the general rule of *Garmon* and accord no concern whatsoever to the congressionally carved exceptions or to those areas recognized in *Garmon* itself as not sufficiently infringing upon national labor policy and of mere peripheral concern to the act or involving matters deeply rooted in local interest and responsibility.

Certainly the wrongful expulsion of Respondent from his union, with his subsequent loss of employment is, as the Idaho Supreme Court pointed out, critical from the individual member's viewpoint but hardly one involving national labor policy, and as could be no more clearly presented by the facts of this case, if the state court is denied its jurisdiction, Respondent would never again regain his union membership. (A. 105). Elmer Day obtained no relief from the Board nor would Respondent. The Board's present position, set forth in its amicus brief, appears to be nothing more than a doctrinaire protectionism of union activity with utter disregard of the rights of the individual workers. The Board now urges, in effect, that it should have the exclusive jurisdiction to deny Respondent a remedy. It is inconceivable that today in these United States, while this court has been courageously fostering and protecting individual rights and liberties, a man can be wrongfully expelled from his union with resulting loss of employment and yet be denied protection or relief in any form or in any forum. This is not and cannot be congressional policy.

That injustices can and do result from an all-encompassing application of the "arguably" rule, without

regard to the recognized areas where it should not be applied, is beyond question. The recently expressed sentiment<sup>22/</sup> for a re-examination of this aspect of *Garmon* and possible clarification of the rule indicates an awareness of the inadequacies of such a general application of the *Garmon* rule. By urging such an all-encompassing application of *Garmon*, Petitioners in effect beseech this court to repeal by judicial fiat the congressionally carved exceptions and wipe out those "penumbral areas" where the activity regulated has little or no effect upon national labor policy or where application of the rule would result in injustices and deprive state courts of traditional jurisdiction.

## **2. THE UNION CONDUCT ENCOMPASSED A BREACH OF THE BARGAINING AGREEMENT FOR WHICH THE UNION IS ANSWERABLE IN THE COURTS.**

Though judgment in this case appears to be predicated upon a breach of the union constitution, the pleadings and the evidence amply support a charge of a breach of the bargaining agreement and the judgment is easily sustained as one lying within the ambit of Section 301, National Labor Relations Act (29 USCA 185).

Section 3 of the bargaining agreement requires that all employees become and remain members of the union. Section 4(b) provides that no employee shall be dismissed from service without sufficient cause.<sup>23/</sup>

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<sup>22/</sup> Justice White joined by the Chief Justice and Justice Stewart in *Longshoremen vs. Ariadne Shipping Co.*, 397 U.S.\_\_\_\_\_, 25 L. Ed. 2d 218, 90 S. Ct.\_\_\_\_\_

<sup>23/</sup> A. 88.

Because Respondent was not so delinquent in dues payments so as to be subject to suspension, his termination from service was without sufficient cause and violated the bargaining agreement. The union motivated and was a party to this violation through the wrongful suspension and notification thereof to the employer, and the union is answerable therefor in the courts under Section 301.

While Respondent's complaint may not have expressly referred to a Section 301 violation, "/s/ince substance and not form must govern, however, we look to the allegations of the complaint and to the federal labor statutes to determine the nature of the claim."<sup>24/</sup>

If Respondent's termination from service violated the bargaining agreement it is within the cognizance of federal and state courts "even if it is, or 'arguably' may be, an unfair labor practice." (*Humphrey vs. Moore*, 375 U.S. 335, 11 L. Ed 2d 370, 84 S. Ct. 363; *Smith vs. Evening News Assn.*, 371 U.S. 195, 9 L. Ed. 2nd 246, 83 S. Ct. 267). "Garmon and like cases have no application to § 301 suits. *Smith vs. Evening News Assn.* 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267." (*Vaca vs. Sipes*, supra)

Petitioners strongly contend throughout their brief that the union conduct in this case involved a violation of the collective bargaining agreement. Petitioners cannot claim that the gravamen of the action is a violation of the collective bargaining agreement and yet deny that the litigation falls within the purview of Section 301 which provides for relief in the courts from such a violation.

<sup>24/</sup> Separate opinion of Justice Goldberg, joined by Justice Brennan, *Humphrey vs. Moore*, 375 U.S. 335, 11 L. Ed. 2d 370, 84 S. Ct. 363.

"The concept that all suits that vindicate employee rights arising from a collective bargaining contract shall be excluded from the coverage of § 301 has thus not survived. \* \* \*

"The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of unions."<sup>25/</sup>

Section 301 is to be liberally construed and not to be given a narrow reading. *Textile Workers Union vs. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912; *Smith vs. Evening News Association*, supra.

Petitioners' claim, therefore, that its conduct was "arguably" prohibited and "arguably" an unfair labor practice is insufficient foundation for precluding state court jurisdiction where, as here, there was a violation of the bargaining agreement.

### **3. THE UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION AND THAT MATTER IS ACTIONABLE IN THE COURTS.**

The broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility and duty of fair representation. *Czosek vs. O'Mara*, 397 U.S.\_\_\_\_, 25 L. Ed. 2d 21, 90 S. Ct. \_\_\_\_; *Vaca vs. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903; *Glover vs. St. Louis & SFR Co.*, 393 U.S. 324, 21 L. Ed. 2d 519, 89 S. Ct. 548; *Humphrey vs. Moore*, 375 U.S. 335, 11 L. Ed. 2d 370, 84 S. Ct. 363; *Conley vs. Gibson*, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S.

<sup>25/</sup> *Smith vs. Evening News Association*, supra.



Ct. 99; *Syres vs. Oil Workers International Union*, 350 U.S. 892, 100 L. Ed. 785, 76 S. Ct. 152; *Ford Motor Co. vs. Huffman*, 345 U.S. 330, 97 L. Ed. 1048, 73 S. Ct. 681; *Brotherhood of Railroad Trainmen vs. Howard*, 343 U.S. 768, 96 L. Ed. 1283, 72 S. Ct. 1022; *Steele vs. Louisville & NR Co.*, 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 226; *Tunstall vs. Brotherhood of Loc. Firemen and Engineers*, 323 U.S. 210, 89 L. Ed. 187, 65 S. Ct. 235.

In *Vaca vs. Sipes*, 386 U.S. 177, citing *Humphrey vs. Moore* with approval, this court stated:

“Under this doctrine, the exclusive agent’s statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”

Following its recognition of the congressionally carved exceptions as well as judicially recognized “penumbral areas” of the *Garmon* rule, this court then noted:

“A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union’s duty of fair representation. The doctrine was judicially developed in *Steele* and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair

labor practice jurisdiction over union activities by the LMRA. \* \* \*” Id. at 180, 181. (Emphasis supplied)

Thus, since the landmark decision in *Steele*, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.

“Were we to hold as petitioners and the Government urge, that the courts are foreclosed by the NLRB’s *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his Complaint, since the Board’s General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. \*\*\*The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union’s breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB’s tardy assumption of jurisdiction in these cases that Congress, when it enacted NLRA § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee’s statutory representative.” Id. at 182, 183.

That the Board would be unwilling or unable to remedy the union conduct here is manifest from its determination on the charge filed by Day.

Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many § 301 suits must adjudicate whether the union has breached its duty, "the courts may also fashion remedies for such a breach of duty." *Id.* at 188. Judgment may be had against the union from those damages flowing from its own conduct. *Czosek vs. O'Mara*, *supra*; *Vaca vs. Sipes*, *supra*.

In the instant case, while the termination from service was the act of the employer, it was motivated solely by wrongful union conduct. Had the employer refused to terminate Respondent's service following notification by the union that he had been suspended from union membership, the employer would have undoubtedly been faced with a strike or other pressure of like nature. The employer's conduct, while it constituted a breach of the bargaining agreement, was motivated in its entirety by the union's breach of duty of fair representation and the damages accruing to Respondent resulted from the union conduct. It is not necessary that the employer be made a party to the action, particularly when it cannot be shown that the employer was in any way implicated in the union's discriminatory action. Since the union has acted independently causing damage to Respondent, it cannot complain if those damages attributable to its conduct are sought in an independent action against it. *Czosek vs. O'Mara*, *supra*.

The allegations of the complaint and the facts found by the trial court clearly sustain a charge that the union did not fairly represent Respondent. Rather than protecting him in his employment, it wrongfully suspended him from union membership, knowing that in so doing his employment would be terminated. Fur-

thermore, it acted in a manner never before indulged in when members were delinquent in their dues<sup>26/</sup> (A. 64, 65) and did not proceed in accordance with its own constitutional requirements<sup>27/</sup> (A. 64, 65).

Not only were others not suspended for delinquencies in dues, but the financial secretary even paid the dues of others out of his own pocket so that they would not become delinquent (R. 125-126), and yet refused to accept repeated tenders of Respondent's dues after his suspension (A. 70, 71). Even international officers of the union became involved and consented to, if they did not actually direct, the suspension.<sup>28/</sup>

The attitude of the union was probably epitomized by its international president when he wrote to Respondent in reply to his entreaty for reinstatement:

"I wish to add, however, that even if I had the power to waive Section 94, I would not\*\*\*." (A. 94)

It would appear that here we have a most flagrant violation of the duty of fair representation for which the union must answer in the courts.

The judgment below should be affirmed.

26/ "Additionally, it has over the years been customary within Division 1055 for members to be in arrears in their dues without being suspended, even though said arrearages exceeded sixty days, it being the custom of Division 1055 in the past, and almost without exception, to remove the delinquent member only from service rather than suspend him from union membership and immediately upon payment of his delinquent dues, put him back in service without loss of seniority." Trial court Findings of Fact VII. A. 60, 61; Trial court Conclusion of Law III, A. 64, 65.

27/ "Additionally, the financial secretary of Division 1055 did not report at the last meeting prior to suspension, that plaintiff or Day were in arrears in dues." Trial court Finding of Fact VII. A. 61. See, also, Section 93 of the union constitution (Pl. Ex. 34; R-10) which requires that the names of delinquent members be read at the last meeting of every month before suspension.

28/ Trial court Conclusion of Law III. A. 64.

## CONCLUSION

The decision below accomplishes precisely that which was permitted in *Gonzales*.

"The purpose for which we exercise jurisdiction is to avoid leaving 'an unjustly ousted member without remedy for the restoration of his important union rights'."<sup>29/</sup>

In wrongfully suspending Respondent from union membership, the union breached the contract (constitution) between the union and the members. This was an internal union matter of mere peripheral concern of the National Labor Relations Act and an activity, the regulation of which, was deeply rooted in local interest and responsibility. Additionally, the activity of the union involves a breach of the bargaining agreement for which the union may be forced to respond in damages in state court under Section 301 of the National Labor Relations Act. Lastly, the facts alleged and proved in this case establish a cause of action and sufficient predicate for judgment against the union for breach of its duty of fair representation for which Respondent may seek redress in the courts.

Respectfully submitted.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

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No. 76

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR COACH EMPLOYEES OF AMERICA  
ET AL, *Petitioners*

v.

WILSON P. LOCKRIDGE

---

On Writ of Certiorari to the Supreme Court of  
the State of Idaho

---

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL  
DEFENSE AND EDUCATION FOUNDATION  
AS AMICUS CURIAE

---

This brief *amicus* in support of the position of the respondent is filed by the National Right to Work Legal Defense and Education Foundation with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

## INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION

The National Right to Work Legal Defense and Education Foundation is an organization formed to protect the right to work, freedom of association, free speech and other liberties of the ordinary men and women who work for a living in this country where they are infringed by unconstitutional or other illegal practices in connection with compulsory union membership. It has found that too many of these people are discharged from their jobs without legal justification. They are seldom able without aid to assert their rights against a formidable combination of employer and union seeking to uphold an initial adverse determination.

They have no certain forum in unfair labor practice cases before the National Labor Relations Board (NLRB) which is heavily burdened in carrying out its major duty of promoting industrial peace by fostering a system of employee organization and collective bargaining and which not unnaturally has as its principal concern the general public interest rather than wrongs done to individual employees. The General Counsel of the Board has complete and unreviewable discretion to determine whether an unfair labor practice complaint shall or shall not be placed before the Board.<sup>1</sup> The remedies within the authority of the

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<sup>1</sup> This Court so recognized in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), where it said: "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. \* \* \*. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. \* \* \*."

NLRB often fall short of those available before the courts.

The individual employees usually prefer to go to courts in their vicinity rather than to resort to the NLRB. They not only find it more practical and convenient but they feel assured of an impartial hearing in the Courts.<sup>2</sup>

The National Right to Work Legal Defense and Education Foundation in seeking to aid these working people in response to their calls for assistance, believes that all avenues of relief should be kept open. It regards as contrary to the public interest the effort of the petitioner here and its supporters to close the doors

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Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."

<sup>2</sup>This need of the individual employees for the right to resort to home-town courts was one of the bases for the dissent of Mr. Justice Douglas with whom Mr. Justice Clark concurred in *Association of Journeymen v. Borden*, 373 U.S. 690, 699-700 (1963): "Suits for damages by individual employees against the union or the employer fall in the category of *Moore v. Illinois Cent. R. Co.*, 312 U.S. 630, 85 L.ed. 1089, 61 S.Ct. 754. As a matter of policy, there is much to be said for allowing the individual employee recourse to conventional litigation in his home-town tribunal for redress of grievances. Washington, D. C., and its administrative agencies—and even regional offices—are often distant and remote and expensive to reach. Under today's holding the member who has a rule dispute with his union may go without a remedy. \* \* \*. When the basic dispute is between a union and an employer, any hiatus that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely."

of the courts, state and federal, to them and to other employees by overruling, directly or indirectly, or by circumscribing the scope of the decisions of this court in *Machinists v. Gonzales*, 356 US 617 (1967), *Vaca v. Sipes*, 386 US 171 (1967), and other cases permitting the courts to retain jurisdiction to afford relief to such employees in accordance with the plainly evident intent of Congress. To confine a complainant, particularly a rank and file employee, to a forum such as the NLRB, where he has no assurance of having his case decided on the merits, is unjust, and even harsh, and the extent of this practice should not be enlarged but restricted at least to its present limits.

#### STATEMENT

Wilson P. Lockridge, the Respondent, was a bus driver for Western Greyhound Lines (Greyhound), and a member of the Amalgamated Association and its Northwest Division (union) who are the petitioners here.

The union on or about November 2, 1959 alleging that Lockridge was not in good standing in its organization suspended him from membership, and then asked the company to discharge him. The company at once complied. (A 90-91).

The union's constitution stated "where a member allows his arrearage for dues, fines and assessments to run over the last day of the second month without payment \* \* \*" he suspends himself from membership. Lockridge's dues for whose non-payment he was suspended were then in arrears for a little over one month, but not over the last day of the second month. (A 91, 92). His suspension—in truth it was expulsion—was therefore in violation of the constitution of the

union which under Idaho law constituted a contract between the union and its members.

The collective bargaining agreement between Greyhound and the union contained a compulsory union membership clause which required all employees to become and remain members of the union as a condition precedent to continued employment. (A 91).

The expulsion violated the collective bargaining agreement since it was made for non-membership in the union at a time when Lockridge was still a member of the union.

Lockridge and Day, another bus driver deprived of membership at the same time, were the only members of the local union who over the years had been expelled for arrearage in dues. In the other cases the arrearages had been waived, even where they exceeded sixty days, and were grounds for expulsion. Lockridge and Day had incurred the displeasure of union officials by discontinuing authorization for check-off of their dues. (A 51, 53, 56, 60-61). Lockridge sought reinstatement but without avail. (A 61, 62, 94, 95).

## ARGUMENT

### I

#### ASSUMPTION OF JURISDICTION BY IDAHO COURTS WAS IN CONFORMITY WITH DECISIONS OF THIS COURT

The petitioner here contends that the case is governed by the general rule of preemption set forth in *San Diego Building Trades Council v. Garmon*, 359 US 236 (1959). Under it where conduct is arguably either protected or prohibited by §§ 7 and 8 of the National Labor Relations Act as amended (Act) juris-



diction is preempted in favor of the Board to the exclusion of state action. Petitioner concedes that *Garmon* itself recognized two exceptions, one where the activity regulated is merely peripheral concern of the Act as in *Gonzales* and the other where the regulation touches interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction this Court could not infer that Congress had deprived the States of power to act as in *International Union UAA&IAW v. Russell*, 356 U.S. 634 (1958), and other cases involving union violence.

But these did not exhaust the qualifications that must be borne in mind in understanding the general rule of *Garmon*. It is not a rule expressly set forth in the Act, but one derived by implication from it. The court in dealing there with the legality of a picket line clearly exhibited its concern over protecting federal administrative jurisdiction over the central provisions of the Act, such as "the vital economic instruments of the strike and the picket line, and \* \* \* the clash of the still unsettled claims between employers and labor unions." (359 U.S. at 241). Again, it repeated what it had previously said in *Garner* (346 U.S. at 488) and in *Gonzales* (356 U.S. 619) "the Labor Management Relations Act leaves much to the States." Obviously Congress has not assumed control of every aspect of labor relations, assigning jurisdiction to the NLRB either as a regulated or a protected activity.

Some idea regarding the areas left to the states is afforded by the decision of this Court in *Vaca v. Sipes*, 386 U.S. 181 (1967), where it enumerated eight exceptions to the preemption rule, three of them statutory and the other five inferred by the court itself from a

consideration of the intention of Congress in enacting various statutes in the labor area:

"This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction: Sec. 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 USC § 187, expressly permits anyone injured by a violation of NLRA § 8(b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board: § 301 of that Act, 61 Stat. 156, 29 USC § 185, permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board (see *Smith v. Evening News Assn.*, 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267); and NLRA § 14, as amended by Title VII § 701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 USC § 164(c), permits state agencies and courts to assume jurisdiction 'over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction' (compare *Guss v. Utah Labor Board*, 353 U.S. 1, 1 L. ed. 2d 601, 77 S. Ct. 598).

In addition to these congressional exceptions, this court has refused to hold state remedies preempted 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.' *San Diego Building Trades Council v. Garmon*, 359 U.S., at 243-244, 3 L. ed. 2d at 781, 782. See, e. g. *Linn v. Plant Guard*

Workers, 383 U.S. 53, 16 L. ed. 2d 582, 86 S. Ct. 657 (libel); *Automobile Workers v. Russell*, 356 U.S. 634, 2 L. ed. 2d 1018, 78 S. Ct. 923 (violence); *International Assn. of Machinists v. Gonzales*, 356 U.S. 617, 2 L. ed. 2d 1018 (wrongful expulsion from union membership); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L. ed. 1154, 62 S. Ct. 820 (mass picketing). See also *Hanna Mining Co. v. Marine Engineers Beneficial Assn.*, 382 U.S. 181, 16 L. ed. 2d 254, 86 S. Ct. 327.

While these exceptions in no way undermine the vitality of the preemption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." (386 U.S. 179-180).

In *Vaca v. Sipes* itself, this Court added an exception to the list consisting of a breach by a union of its duty of fair representation. (388 U.S. at 180-181).

Another exception not mentioned by the Court is of substantial significance in according an insight into congressional policy towards permitting the courts to assume jurisdiction in labor relations matters. Section 101 of Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411, contains a Bill of Rights of Members of Labor Organizations. Section 102, 29 USC 412, provides that any person whose rights secured in the title have been violated may bring a civil action in a District Court for relief including an injunction.

The AFL-CIO in its brief mentions a number of other exceptions: union organizational activity directed

at foreign flag seamen, *Inces S.S. Co. v. Maritime Workers*, 372 U.S. 24 (1963); the enforcement of state right to work laws, *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963); and the use of economic pressure in connection with representation disputes involving supervisors, *Hanna Mining Co. v. Marine Engineers Beneficial Assn.*, 382 U.S. 181 (1965). Even the list of exceptions as thus augmented doubtlessly falls short of being exhaustive.

## II

### DECISION BELOW CORRECTLY INVOKED EXCEPTION TO PRE-EMPTION RULE IN PERIPHERAL MATTERS SUCH AS EXPULSION FROM UNION AND RESULTING DAMAGES

The Supreme Court of Idaho correctly sustained the jurisdiction of the state courts over Lockridge's suit involving the peripheral matter exception to the *Garron* rule—as one for reinstatement in the union and for damages for illegal expulsion.

The second amended complaint in praying for relief asked for damages and for "such other and further relief as to the Court may appear meet and equitable in the premises. (A 48, 99-100). The allegations set forth supported by the evidence at the trial clearly showed that Lockridge had over an extensive period following his unjustified expulsion from the union asked for reinstatement. (A 61, 62, 94, 95). They showed that he was entitled to this form of relief as well as to damages. The District Court at the second trial awarded reinstatement as well as damages, strictly in accordance with Rule 54(c) of the Idaho Rules of Civil Procedure which is identical with Rule 54(c) of the Federal Rules of Civil Procedure mandatorily requiring "every final judgment *shall* grant the relief to which the party in whose favor it is rendered

is entitled, even if the party has not demanded such relief in his pleadings." (Italics ours.)

The case before the Supreme Court of Idaho on the second appeal now before this court concerns the jurisdiction of a state court over an action by an expelled member for reinstatement in the union and for damages consequent upon the wrongful expulsion.

The suit is based upon the expulsion of Lockridge by the union in violation of the contract between the union and its members embodied in its constitution as well as in violation of the collective bargaining agreement between the union and the employer. These two contractual violations were the fountain head of the entire injuries suffered by Lockridge. But for his unjustified expulsion none of the other consequences would have followed. The union's demand upon the employer for the discharge of Lockridge in violation of the collective bargaining agreement was the basis for the damages claimed and awarded. Hence the court below found the case to be one focusing on purely internal matters of the defendant union, the employer having been dropped as a defendant. (A 49, 89). The court looked not alone at the matter of contract violations but at the conduct of the parties taken as a whole, (A 105), although as the Solicitor General and the Board concede the NLRB as well as a court must interpret the constitution of the union and the union shop clause of the collective bargaining agreement to decide this type of a case. (Amicus Curiae brief, p. 18)

The court below therefore was justified in relying upon *International Assn. of Machinists v. Gonzales*, 356 U.S. 617 (1958). It found that case controlling in favor of state jurisdiction and there is no sufficient rea-

son for doubting the soundness of this conclusion. Gonzales sought relief in a state court in California for expulsion from membership in the union in violation of its constitution and for resulting damages. The judgment was for reinstatement and damages for lost wages as well as for physical and mental suffering (365 U.S. at 618). Most of the damages were for lost wages arising from the refusal of the union hiring hall because of his expulsion from the union to refer him for employment, (142 C.A. 2d at 221-2), which was undoubtedly related to employment and was at least arguably an unfair labor practice. (See 356 U.S. 619-620).

After noting the generally prevailing rule followed in California that the constitution of a labor organization constitutes a contract between it and its members (356 U.S. at 618-19) this court in an opinion by Mr. Justice Frankfurter went on to uphold the right of state courts to entertain jurisdiction to order the reinstatement of union membership:

“But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that “this paragraph shall not impair the right to a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .” 61 Stat. 141, 29 USC § 158(b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for “retention of membership therein.” Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union mem-

bership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Constr. Workers v. Laburnum Const. Corp.* 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 833." (356 U.S. at 620).

This Court also upheld the right of the California court to award damages on grounds which are equally applicable here:

"The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." (356 U.S. at 621).

There is one really significant difference between *Lockridge* and *Gonzales*. Here, there was a union shop clause in the collective bargaining agreement which the petitioner caused to be violated. There was no such agreement in *Gonzales*, although the plaintiff there experienced the same difficulty in getting a job after expulsion from the union as the plaintiff here, his trouble however, arising from a different source—the refusal of the union hiring hall to refer a non-union member to any employer. But the difference is in favor of state court jurisdiction in the case at bar because there is no federal preemption in favor of the union shop.



Petitioner is seriously in error in contending that the union shop clause is manifestly a vital tool of labor and one which Congress obviously regarded as at the heart of the Act. (Petitioner's brief p. 20, 50-51).

If there is any comprehensive regulation of the union shop in the Act, it is found in Section 8(a)(3)—and principally in its two provisos. Section 8 defines unfair labor practices by an employer. The first clause of Section 8(a)(3) defines one such unfair labor practice as “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” This is immediately followed by the first proviso, which states: “*Provided*, that nothing in this Act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization \* \* \* \*” for a modified union shop. This disclaimer leaves the matter up to the states. To remove any possible doubt on this point, Congress in the Labor Management Relations Act added § 14 (b) which reads:

“Sec. 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by State or territorial laws.”

This Court has held that Sections 8(a)(3) and 14(b) constitute a disclaimer of federal preemption in the field of the union shop. *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949). In issue there was the discharge of an employee for failure to pay union dues as required by a union shop agreement when the

agreement had not been approved by two-thirds of the employees in a referendum required by a state statute. The defense was that the state statute had been preempted by Section 8(3) of the original National Labor Relations Act (the Wagner Act) or by Sections 8(a) (3) and 14(b) of the Labor Management Relations Act. This Court in an opinion by Mr. Justice Frankfurter held that there had been no preemption under either federal statute and hence the state statute was effective and the discharge unlawful. The Court first considered the contention that Section 8(3) of the Wagner Act swept aside the state law and held that it did not because it was merely a disclaimer of a national policy hostile to compulsory union membership. The Court said at page 306-7:

“The contention that § 10(a) of the Wagner Act swept aside State law respecting the union shop must therefore be rejected. If any provision of the Act had that effect, it could only have been § 8(3), which explicitly deals with membership in a union as a condition of employment. We now turn to consideration of that section.

Section 8(3) provides that it shall be an unfair labor practice for an employer

“By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act . . . , or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit  
\* \* \*

It is argued, therefore, that a State cannot forbid what § 8(3) affirmatively permits. The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of the words "nothing in this Act . . . or in any other statute of the United States," and it is confirmed by the legislative history."

The Court then proceeded to consider the further contention that Sections 8(a)(3) and 14(b) of the Labor Management Relations Act which had been passed after the discharge of the plaintiff but before the case was decided preempted the field. The Court held that they did not, saying at Pages 313-14:

"Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) \* \* \* was included to forestall the inference that federal policy was to be exclusive. It reads:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that

the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, which under the circumstances "is prohibited" by the State, the legislative history of the section would dispel it."

In *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 104 (1963), this Court in holding that a state may enforce its statutory prohibition against an agency shop clause in a collective bargaining agreement followed its previous decision in *Algoma* saying:

"The court in *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301, 314, 93 L. Ed. 691, 702, 69 S. Ct. 584, stated that "§ 14(b) was included to forestall the inference that federal policy was to be exclusive" on this matter of union-security agreements. In that case a state agency issued a cease-and-desist order against an employer from giving effect to a maintenance of membership agreement and ordered an employee reinstated and made whole for any loss of pay suffered. It was urged that since § 10(a) of the Wagner Act gives the Federal Board "exclusive" power to prevent "any unfair labor practice," state power in the federal commerce field was displaced. *Id.* 336 U.S. at 395, 93 L. Ed. at 698. State power, however, was held to exist alongside of federal power because of the special legislative history of the union-security provisions of the Act."

Some nineteen states have prohibited the union shop. Idaho has not. But it could do so at any time. Congress has given its express permission. Whether a union shop is to be permitted in Idaho is left to state law, although what is permitted there may not overstep the limits set in the two provisos to Section 8(a) (3) of the Labor Management Relations Act. The regulatory control is thus divided between state and

federal jurisdictions instead of being entirely preempted by the federal government to the exclusion of the states. Congress has by express statutory provisions disclaimed the idea of assuming exclusive control or of vesting it in the National Labor Relations Board.

No question is presented here concerning the construction of any of those statutory provisions or the legality under them of the union shop clause of the collective agreement. The question presented is one of the proper interpretation of that agreement—whether an employee who continues to be a member of the union under the terms of its constitution may be discharged for non-membership in the union—a question so simple that it answers itself. It could not conceivably be regarded as a vital problem of labor relations or going to the heart of national labor policy. But even if we may not consider the simple question actually involved and must address ourselves to the union shop arrangement in some broader context we still cannot regard it as the petitioner contends at the very heart of the national labor policy or so extensively preempted by Congress that the state court may not without contravening the national labor policy interpret a simple contract clause going little further than to say that any employee shall be discharged who does not maintain his membership in the union.

It follows that there is less reason to regard *Lockridge* as preempted than *Gonzales* where the hiring hall that brought about most of the damages suffered by the plaintiff cannot be said to be left to the states to the same extent as the union shop.

It is clear that the case at bar comes under the peripheral area exception to the rule of preemption in *Garmon*.

There is every reason to believe that *Gonzales* still represents a valid exception to the preemption rule in *Garmon*.

Not only did this Court twice cite *Gonzales* with approval in its decision in *Garmon*, but in later cases it has referred to it with approval. Two of these cases were decided in 1967, subsequently to *Association of Journeymen v. Borden*, 373 U.S. 690 (1963), and *Ironworkers Union v. Perko*, 373 U.S. 701 (1963), the cases relied upon by petitioner.

In *Vaca v. Sipes*, 386 U.S. 171, 180 (1967), the court in enumerating non-statutory exceptions that it has recognized to the rule in *Garmon* listed matters of "a merely peripheral concern of the Labor Management Relations Act" and cited *Gonzales* as exemplifying one of them. (386 U.S. at 180).

In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) this court referred with approval to the body of law establishing standards of fairness in the enforcement of union discipline that has grown up around the contract doctrine of *Gonzales*, saying:

"In *Machinists v. Gonzales*, 356 U.S. 617, 618, 2 L. ed. 2d 1018, 1020, 78 S. Ct. 923, we recognized that "[t]his contractual conception of the relation between a member of his union widely prevails in this country. \* \* \*".

Although State Courts were reluctant to intervene in internal union affairs, a body of law establishing standards of fairness in the enforcement of union discipline grew up around this contract doctrine. See *Parks v. Electrical Workers*, 314 F. 2d 886, 902-3."

Since *Gonzales* represents the law as it stands today, and *Lockridge* comes within the principles there established, the Supreme Court of Idaho was right in regarding it as controlling here.

### III

#### THIS CASE IS DISTINGUISHABLE FROM BORDEN AND PERKO

This case as the Idaho court held is clearly distinguishable from *Association of Journeymen v. Borden*, 373 U.S. 690 (1963), and *Ironworkers Union v. Perko*, 373 U.S. 701 (1963).

The main reliance of the petitioner's argument seems to be that *Gonzales* has been overruled by *Borden* and *Perko*. In *Borden*, (373 U.S. at 697), and *Perko*, (373 U.S. at 705), however, this court held that *Gonzales* was not in point because it is distinguishable. In neither case did the action involve reinstatement of an expelled union member, or conduct on the periphery of labor relations.

In *Borden* the controversy was over the refusal of the union to refer the plaintiff, one of its members, for work on a particular construction project, where he had sought and obtained a promise of employment in violation of a union rule. This Court held that the state court was without jurisdiction because the suit was focused principally if not entirely on the union's actions with respect to Borden's efforts to obtain employment and involved conduct arguably subject to the Board's jurisdiction.

It said it was of no significance that the complaint against the union sounded in contract as well as in tort since it is the conduct of the parties rather than the label affixed to the cause of action that is deter-



minative of the relationship between state and federal jurisdiction.

In the case at bar, in a complaint with two counts, one in contract and one in tort, before a state court the focus was on the two contracts and their interpretation and the relief granted was for violation of the contracts. If the complaint had been of an unfair labor practice before the National Labor Relations Board the focus would have been on the same things. Before the Board the decisive issue would have been whether the union had violated the contracts, just as that had actually been the decisive issue on the merits before the Idaho courts. There was no dispute over interpretation of the statute, no technical problem of labor relations, no call for expertise in that field. Hence the case at bar is fundamentally different and distinguishable from *Borden* just as it involves the same basic issues as *Gonzales*.

The distinction between *Gonzales* and *Perko* is even more evident. The plaintiff there brought suit against the ironworkers union of which he was a member and certain of its officers seeking damages under state common law for a conspiracy to deprive him of the right to continue to work as a foreman. A rule of his union prohibited any member under penalty of a fine from leaving the Ironworkers to go in as a Boilermaker or assist the other union in any way. The union claimed Perko had violated this rule, when as a superintendent he assigned to Boilermakers work over which the Ironworkers claimed jurisdiction. It found him guilty, and informed the employer that its members would no longer take orders from him because he had been educating Boilermakers in work belonging to Ironworkers. The company laid him off due to his

dispute and he thereafter could not obtain employment either as superintendent or as a foreman, but only as an ordinary iron worker.

This Court held that for the reasons set forth in *Borden* the rationale of *Gonzales* did not support state jurisdiction. The crux of the action it said concerned alleged interference with existing or prospective employment relations and was not directed to internal union matters. (373 U.S. at 705). It characterized the case as one presenting "difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole' ". (373 U.S. at 706). Thus *Perko* like *Borden* while a small case raised complex issues of labor relations. Both cases are quite unlike the peripheral case of simple contract interpretation found in *Lockridge*, where the issues of interpretation would be controlling before the Board as they were before the Idaho courts.

#### IV

#### IDAHO COURT HAD JURISDICTION UNDER SECOND EXCEPTION TO PREEMPTION RULE—A SUIT FOR VIOLATION OF SECTION 301 OF NLRA

Although they did not so hold, the Idaho courts had jurisdiction of this case under the facts set forth in the complaint under two further exceptions to the preemption rule of *Garmon*.

They had jurisdiction under Section 301 of the Labor-Management Relations Act, 29 USC 185, which expressly gives jurisdiction to any district court of the United States in suits for violation of contracts between an employer and a labor organization. A state court has concurrent jurisdiction.

This Court held in *Dowd Box v. Courtney*, 368 U.S. 502 (1962) that a state court has concurrent jurisdiction over suits under Section 301 under the principle that an Act of Congress conferring jurisdiction on a federal district court is also subject to enforcement in a state court unless the statute expressly reserves exclusive jurisdiction to the federal court, as Section 301 does not. The court also pointed out that when the Labor Management Relations Act was under consideration in Congress the bill passed by the Senate contained a provision making a breach of a collective bargaining agreement an unfair labor practice subject to the jurisdiction of the NLRB, as well as a provision conferring jurisdiction upon the federal courts over such suits. In conference, however, between the two Houses it was decided to make the suits cognizable in the courts; the statute as passed so provided. (368 U.S. at 510, 511).

Here the collective bargaining agreement was violated by the discharge of Lockridge for non-membership in the union when he was in fact at the time a member of the organization, and this violation was the basis for the award of damages.

The Petitioner goes even further contending that this was "certainly an employment relation case because all of the relief except restoration to union membership 'necessarily had to turn on this court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound' ". (Petitioner's brief p. 47), and that the crux (Petitioner's brief, p. 16) or gravamen (Petitioner's brief, p. 24) of this case is the allegation of a discharge by Greyhound in violation of the collective agreement. Petitioner cannot have it both ways—cannot claim

that the crux of the case is this violation of the collective bargaining agreement and yet deny the suit is within the jurisdiction of the court under Section 301 for relief from such a violation. Such a suit may be maintained regardless of the subsidiary issues raised and certainly whether or not employment relationships are involved since such relationships are the principal subject matter of collective agreements.

In *Smith v. Evening News Assn.*, 371 U.S. 195 (1962), an employee of a newspaper individually and as assignee of other members of a union brought suit in a Michigan court asserting violation of a collective bargaining agreement provision forbidding discrimination against any employee because of union activity. The discrimination focused on employment during a strike—allowing non-union employees to report for work and paying them even though there was no work available during the strike but denying similar privileges to the union plaintiffs. The state courts refused to entertain the suit holding that the discrimination was an unfair labor practice within the exclusive jurisdiction of the NLRB under the preemption rule of *Garmon*. This court reversed holding that the action arose under § 301 and was not preempted under the *Garmon* rule, saying in part:

“In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the preemption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employee, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301.”

The Court also overruled a contention that Section 301 applies to suits brought by unions but not to suits by employees (371 U.S. at 200-201). It is significant that the NLRB in an *amicus curiae* brief filed there by the Solicitor General asserted that the ousting of courts of jurisdiction under Section 301 in the case would not only fail to promote but would actually obstruct the purposes of the Labor Management Relations Act. That would seem to be as true here as there in spite of the NLRB's *amicus* brief here seeking to oust the jurisdiction of the Idaho court.

*Smith v. Evening News Assn.* was brought against an employer. *Humphrey v. Moore*, 375 U.S. 335, likewise a suit brought in a state court under Section 301 for violation of a collective bargaining agreement, was a class action brought against the union and the employer by an employee of a motor carrier for an injunction to prevent enforcement of an award of a joint employer-employee committee created under a collective labor contract to settle a controversy with respect to seniority of employees following the absorption by the employer of another motor carrier. The award by reducing his seniority would have caused the plaintiff to lose his job and thus, of course, directly involved employment rights. This Court held that the complaint stated a cause of action within the jurisdiction of the state court whether or not it involved an unfair labor practice under the Act, citing with approval its previous decision in *Smith v. Evening News, supra*:

“For these reasons, this action is one arising under Section 301 of the Labor Management Relations Act and is a case controlled by Federal Law, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448,

1 L. ed. 2d 972, 77 S. Ct. 912, even though brought in a state court. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 7 L. ed. 2d 593. 82 S. Ct. 571; *Smith v. Evening News Assn.*, 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267. Even if it is, or arguably may be an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, *Smith v. Evening News Assn.*, *supra* subject, of course, to the applicable federal Law." (375 U.S. at 343-4).

In *Vaca v. Sipes*, 386 U.S. 171, 180 (1967), this court again cited with approval the decision in *Smith v. Evening News Assn.*, *supra*, on the right of an employee to sue under Sec. 301 for unlawful discharge in violation of a collective bargaining agreement:

"If an employee is discharged without cause, either the union or the employee may sue the employer under LMRA § 301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. *Garmon* and like cases have no application to § 301 suits. *Smith v. Evening News Assn.*, 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267."

This court has said that Section 301 is to be liberally construed and is not to be given "a narrow reading" to limit the kind of cases that may be brought under it. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456-7 (1957); *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962).

Clearly enough the state court in the case at bar had jurisdiction under Section 301 whether or not the

crux or the gravamen of the action was the unlawful discharge or whether the conduct of the defendant also constituted an unfair labor practice within the exclusive jurisdiction of the NLRB.

## V

### **THIS CASE COMES WITHIN THIRD EXCEPTION TO PREEMP- TION RULE—SUIT FOR BREACH OF UNION'S DUTY OF FAIR REPRESENTATION**

When the union expelled Lockridge from membership without justification and when it notified the employer that Lockridge was no longer a member and demanded that he be discharged from his employment it breached its duty of fair representation.

The expulsion from the union was plainly in violation of the provisions of the union constitution. The flagrant discrimination against Lockridge by expelling him for a short term delinquency in dues was not only unjustified under the provisions of the constitution but it was also contrary to the custom and practice of the union local in granting leniency for delinquency in dues payments even where unlike here they were long enough to constitute valid grounds for expulsion (A 51-53, 56, 60, 61). The statement that he was no longer a member was contrary to fact—and the request to Greyhound that he be removed from employment on the basis of this false and misleading representation was also a breach of the duty of fair representation.

The petitioner was the exclusive bargaining agent for Lockridge and the other bus drivers under Section 9 of the Act as well as under the provisions of the collective bargaining agreement. The employees could not avail themselves of other representation, nor even represent themselves. They were bound by the acts of



petitioner within the scope of its authority. Under these circumstances the law imposed on petitioner a duty of fair representation.

The duty of fair representation was first established in cases arising under the Railway Labor Act in which employees who had been discriminated against on account of race were held to have the right to sue first the union and then the employer to secure removal of the discrimination. *Steele v. Louisville & N R Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive F & E*, 323 U.S. 210 (1944); *Brotherhood of Trainmen v. Howard*, 343 U.S. 768 (1952); *Conley v. Gibson*, 355 U.S. 41 (1957); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969); *Czosek v. O'Mara*, 397 U.S. 25, 25 L. ed. 2d 21 (1970). The duty has subsequently been extended to embrace cases arising under the National Labor Relations Act. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952).

In *Vaca v. Sipes*, *supra*, the court described this duty of fair representation as follows at page 177:

"It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see *Ford Motor Co. v. Huffman*, 345 U.S. 330, 97 L. ed. 1048, 73 S. Ct. 681; *Syres v. Oil Workers International Union*, 350 U.S. 892, 100 L. ed. 785, 76 S. Ct. 152, and in its enforcement of the resulting collective bargaining agreement, see *Humphrey v. Moore*, 375 U.S. 335, 11 L. ed. 2d 370, 84 S. Ct. 363. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives

under the Railway Labor Act, see *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 89 L. ed. 173, 65 S. Ct. 226; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 89 L. ed. 187, 65 S. Ct. 235, and was soon extended to unions certified under the NLRA, see *Ford Motor Co. v. Huffman*, *supra*. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey v. Moore*, 375 U.S. at 342, 11 L. ed. 2d at 377. It is obvious that Owens' complaint alleged a breach by the union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. *E. G. Ford Motor Co. v. Huffman*, *supra*."

The duty is co-extensive with the authority of the union as the collective bargaining agent. It extends to all of its activities within the scope of this authority. The extent of the duty was outlined by this Court in *Conley v. Gibson*, *supra*:

"The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end as the respondents seem to contend with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things it involves day to day adjustments in the contract and other working rules, resolutions of new problems not covered by existing agreements and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face, yet adminis-

tered in such a way with the active or tacit consent of the union as to be flagrantly discriminatory against some members of the bargaining unit." (355 U.S. at 46).

The scope of the duty was described in *Humphrey v. Moore*, 375 U.S. 335, 342 (1964), as consisting of "the negotiation and administration of a collective bargaining contract. In *Vaca v. Sipes, supra*, the duty was referred to in much the same way as consisting in "collective bargaining \* \* \* and in its enforcement of the resulting collective bargaining agreement." (386 U.S. at 177).

In *Vaca v. Sipes, supra*, this Court held that an allegation by an employee that he had been discharged from his job in violation of a collective bargaining agreement and that the union had arbitrarily refused to take his grievance to arbitration also set forth a violation of the duty of fair representation which was likewise cognizable by a court, even though the facts alleged constituted an unfair labor practice. In so holding, this Court said in part:

"A primary justification for the preemptive doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in *Steele* and its progeny and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the LMRA. Moreover, when the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would

henceforth be treated as an unfair labor practice the Board adopted and applied the doctrine as it had been developed by the Federal Courts." (386 at 180, 181).

*Conley v. Gibson*, *supra*, 355 U.S. 41 (1957), *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969), and *Czosek v. O'Mara*, 397 U.S. 25, 25 L. ed. 2d 21 (1970), were all concerned not with the negotiation but as here with the administration of a collective bargaining agreement.

It follows that the state court was justified by this third exception to the preemption rule of *Garmon* in entertaining jurisdiction of Lockridge's complaint, even though the facts of the case might also constitute a sufficient basis for a charge of unfair labor practice under the Board's jurisdiction.

## VI

### THE COMBINATION OF THE THREE EXCEPTIONS GIVES ADDED STRENGTH TO THE HOLDING THAT THE STATE COURT HAD JURISDICTION

Any one of the three exceptions to the preemption rule of *Garmon* just reviewed would be sufficient to sustain the jurisdiction of the state court over the present action against the contention that since the facts disclose one or more unfair labor practices the case is within the exclusive jurisdiction of the NLRB. But the case in favor of state court jurisdiction here is greatly strengthened by the presence together of all three of the exceptions, and with each lending strength to the other.

The *Gonzales* exception it is true is limited to peripheral matters such as a suit by a union member for reinstatement in a labor organization and for damages caused by his expulsion. But the exception covering

cases brought under Section 301 of the Act for violation of a collective bargaining agreement is by no means limited to such purely peripheral matters. Suits brought under this exception ordinarily embrace controversies dealing with employment rights. *Humphrey v. Moore*, 375 U.S. 335 (1964); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). Similarly, suits brought for breach by a union of its duty of fair representation cover a wide range of employment problems. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952); *Czosek v. O'Mara*, 397 U.S. 25, 25 L. ed. 2d 21 (1970); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969); *Conley v. Gibson*, 355 U.S. 41 (1957); *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944).

Accordingly, there is very little point to the insistent argument of petitioner and its amici that the state court is deprived of jurisdiction because the crux of this case concerns a violation of the collective bargaining agreement in its provisions dealing with employment rights. This is no bar to an action like the present one for relief under Section 301 of the Act and for breach of the duty of fair representation. The proceeding here is the clearest kind of a case for sustaining the jurisdiction of the state courts below.

### CONCLUSION

The judgment of the Supreme Court of Idaho should be affirmed.

Respectfully submitted,

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August 5, 1970

FILE COPY

No. 76

FILED

DEC 7 1970

E. ROBERT SEEVER, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
an International Labor Union; and NORTHWEST  
DIVISION 1055 of the AMALGAMATED ASSOCIATION  
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, a Regional Division of  
the International Union, *Petitioners,*

v.

WILSON P. LOCKRIDGE, *Respondent.*

On Writ of Certiorari to the Supreme Court of the  
State of Idaho

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

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No. 76

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAIL-  
WAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
an International Labor Union; and NORTHWEST  
DIVISION 1055 of the AMALGAMATED ASSOCIATION  
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, a Regional Division of  
the International Union, *Petitioners*,

v.

WILSON P. LOCKRIDGE, *Respondent*.

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On Writ of Certiorari to the Supreme Court of the  
State of Idaho

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**REPLY BRIEF FOR PETITIONERS**

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The single issue in this case is whether a State Court may assert jurisdiction over a claim made under *State* law which embraces union conduct that is either prohibited or protected under the Labor Management Relations Act, 29 U.S.C. §§ 151 *et seq.* ("Act"). That is the only question which was presented to the Courts

below; and that is the only one considered or decided by them. That is the only question presented in the petition for certiorari; and that is the only one discussed in the brief in opposition. To that question, Petitioners urge that the answer is clear: There is no such State Court jurisdiction, particularly under the teachings of this Court in the *Borden* and *Perko* cases. Now Respondent Lockridge evidently agrees. For in his Brief on the merits ("Resp. Br.") Lockridge strives to inject into the case additional questions as to *Federal* law grounds of jurisdiction under Section 301 of the Act, 29 U.S.C. § 185, breach of the collective bargaining contract and breach of the Union's duty of fair representation. We shall demonstrate that there are no such questions properly before this Court and that in any event Lockridge's position is utterly without merit. First, however, we shall discuss the question which is indeed presented in this case.

# I.

## **THE STATE COURTS HAD NO JURISDICTION OVER LOCKRIDGE'S CLAIM BECAUSE IT INVOLVED UNION CONDUCT PLAINLY REGULATED BY THE ACT**

Lockridge does not attempt any genuine reply to our principal Brief ("Pet. Br."). He assays no reply whatever, for example, to the demonstration that Congress has occupied the field and closed it to State Court jurisdiction (Pet. Br. 58-63), which independently and apart from the "arguably" touchstone requires reversal of the judgment below. Nor does he make any reply to basic elements of our exposition of the law on the "arguably" touchstone, for example, the demonstration that this identical kind of claim is routinely and exclusively handled by the NLRB (Pet. Br. 52-55)—a fundamental element in

the case confirmed and elucidated by the Board's Brief as *Amicus Curiae* herein. And Lockridge almost completely disregards the balance of our principal Brief, for example, the analysis of the Act and the discussion of *Borden, Perko* and *Day*. For the most part, Lockridge merely repeats the conclusory assertions of the Court below without any regard to the response to that decision in our Brief (Pet. Br. 46-52). Indeed, Respondent's entire Brief reads as though he had glanced at Petitioners' only to excise some portions out of context to be fitted into the precast contours of his own.<sup>1</sup> Accordingly, Respondent's Brief con-

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<sup>1</sup> In many respects, Lockridge grossly misstates our position. For example, we do not "postulate that there are only two types of activities, those protected and those prohibited, and if an act is not prohibited by Section 8, it must, *a fortiori*, be protected" (Resp. Br. 10-11). Our position is hardly so generalized or comprehensive. We contend only that the particular Union activity involved in this case—causing the discharge of an employee by notifying the employer under the union-security agreement that the employee has not timely tendered the periodic dues uniformly required as a condition of employment—is certainly either protected or prohibited, by virtue of the comprehensive regulation which Congress accorded this particular activity. Without addressing himself to the statutory language discussed by us which expressly demonstrates this, Lockridge appears to deny both that this activity is prohibited and that it may be protected. On the one hand, he asserts "Congress had disclaimed the assumption of exclusive federal control and has really done nothing more than proclaim that the federal policy is not hostile to union security clauses" (Resp. Br. 14). This is plainly nonsense, in the light of the express statutory provisions, particularly § 8(b)(2) of the Act, which are directly applicable. Manifestly, the Federal policy is hostile to certain specified union and employer conduct relating to union-security clauses. In particular, Congress has with unmistakable and express clarity proclaimed it unlawful for a union to engage in the very conduct of which Petitioners stand accused by Respondent in this case.

For his assertion that the conduct of procuring an employee's discharge under a union-security clause which is valid under the

tains nothing on the issue which is actually in the case which merits any discussion in addition to that contained in our principal Brief, except the novel contention that § 14(b) of the Act, 29 U.S.C. § 164(b), somehow implies some special immunity from pre-emption for States like Idaho which have enacted no legislation falling within its terms.

This contention cannot survive the fact that Congress squarely confronted the issue of pre-emption in this particular field—union activity involving the employment relationship pursuant to a union-security

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Act may not be protected, Respondent indulges himself in the following statutory analysis: "Section 7 refers to protected activities of 'employees'—individuals. The Union cannot claim that its conduct here falls under the mantle of protected activity of employees under Section 7. Not only is the Union not an 'employee' but its conduct in the instant case does not constitute one of the activities protected" (Resp. Br. 11). This is simply fatuous. The activities which are protected are of course activities related to unions. The very purpose of the Act was to protect the right of individuals to engage in union activity. Section 7 thus reads, "Employees shall have the right to self-organization, to form, join, or assist labor organizations \* \* \* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section [8(a)(3)] of this title." Manifestly, one of the "activities" that employees have the "right" to engage in—protected by Section 7—is to assist labor organizations and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection by a union which has augmented its strength by virtue of a union security agreement. This Court has recognized that enforcing valid union security agreements to eliminate "free riders" was one of the purposes of these particular provisions of the Act and that this Union conduct is protected by Section 7. See, e.g., *Radio Officers v. Labor Board*, 347 U.S. 17 (1954).

clause. "Congress undertook pervasive regulation of union-security agreements \* \* \*." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 100 (1963); see also *Radio Officers v. Labor Board*, 347 U.S. 17, 40-42 (1954), quoted at Pet. Br. 32; cf. *Labor Board v. General Motors*, 373 U.S. 734, 740-743 (1963). That Congressional regulation embraced the issue of pre-emption. In § 14(b) Congress set the metes and bounds of permissible State intervention: States may legislatively invalidate or impair the effectiveness of union-security provisions. But in the absence of such State legislation, the Federal law is to prevail. Accordingly, while a State Court may have jurisdiction concurrent with the National Labor Relations Board to interpret and enforce a State statute with respect to union-security agreements, *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963), cited at Resp. Br. 14, it has no such jurisdiction where there is no such State statute. In that event the Act prevails and renders Union conduct pursuant to union-security clauses either protected or prohibited. To this extent we might agree with Lockridge that by virtue of § 14(b) "the regulatory control of union security clauses has thus been divided between state and federal jurisdiction" (Resp. Br. 14).

In Idaho Federal jurisdiction prevails. Idaho has no legislation countenanced by § 14(b). Consequently, the emphasis by Respondent on § 14(b) demonstrates precisely the opposite of what it was submitted to demonstrate. That Section has nothing to do with the case. This Union conduct is not subject to any State legislation but is governed by the Federal Act and thus stands pre-empted.



## II.

**THERE ARE NO OTHER ISSUES IN THIS CASE**

In transparent recognition that this Court must hold against him on the question actually presented in this case, Lockridge embarks on an audacious attempt to transform his claim by allusions to breach of the collective bargaining contract and breach of the duty of fair representation (Resp. Br. 1-2, 7-8, 21-28).<sup>2</sup> But this bold ploy cannot succeed. There are no such issues in the case—not least because Lockridge deliberately excluded them. Moreover it would be most unjust for this Court to accord them any consideration, Petitioners having been seriously prejudiced. But should the Court consider these issues, Petitioners should be sustained on the applicable Federal law.

1. Although the case concerns only a judgment against Petitioner Unions, Lockridge does not assert that they breached the collective bargaining contract. Rather, his present assertion is that Greyhound breached it by discharging him without sufficient cause.<sup>3</sup> His theory is that the breach by Greyhound

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<sup>2</sup> There is a parallel between this case and *Day* even on this score. In *Day* also, issues relating to § 301 were sought to be introduced in this Court. See *Day v. Northwest Division 1055, etc., et al.*, No. 301, O.T. 1964, Petition for Certiorari, pp. 10-14. In that case, moreover, there had been reference to § 301 in the dissenting opinion in the State Supreme Court. Nevertheless, this Court denied *Day's* petition for a writ of certiorari to the Oregon Supreme Court. 379 U.S. 878 (1964).

<sup>3</sup> The record on file with the Clerk of this Court contains the complete collective bargaining contract, Plaintiff's Exhibit 35. Sections 3(c) and 3(d) provide a grievance procedure culminating in binding arbitration "on all questions relating to the interpretation or application of the provisions of this agreement \* \* \*." Obviously, any question of whether Lockridge's discharge was

is actionable against Petitioners as a breach of contract by them because they "motivated" the breach by Greyhound (Resp. Br. 7, 22). To state this theory is to brand it as a figment of Respondent's imagination. There is no such cause of action against a union under § 301 for motivating an employer's breach of contract. Lockridge cites no authority supporting his freshly minted theory; and there is none.

This is actually not any such new theory as Lockridge implies. To the contrary, it is the same old theory of tortious interference with employment under State law which is and has been the only claim involved in this case. The Union conduct which constituted the alleged motivation, however described, is the selfsame conduct which, for the reasons set out in our original Brief and not genuinely controverted by Respondent, is subject to the jurisdiction of the NLRB pre-empting any State Court jurisdiction.

2. Lockridge deliberately refrained from making any allegation of breach of the collective bargaining contract in the Second Amended Complaint upon which this case was tried. In particular, that Complaint

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"without sufficient cause" within the meaning of the contract would be subject to arbitration. Lockridge, who has insisted throughout that the collective bargaining contract has nothing to do with the case, see n. 4, *infra*, patently has no basis whatever for any assertions about a breach of contract, the merits of which would be determinable only in arbitration under the national labor policy. Cf. *Boys Markets v. Clerks Union*, 398 U.S. 235 (1970).

It is a gross misreading to assert that "Petitioners strongly contend throughout their brief that the union conduct in this case involved a violation of the collective bargaining agreement" (Resp. Br. 22). Conspicuously, there is no citation at that point. Our principal Brief contended that the Union conduct in this case involved the *employment relationship*. This Lockridge denied below and the State Courts accepted his position.

makes no reference to the "sufficient cause" provision upon which Lockridge now evidently seeks to rely (Resp. Br. 22; see n. 3, *supra*). This was manifestly deliberate, for the original Complaint did include such a claim. Originally, Lockridge joined the employer Greyhound as a party defendant and alleged that the termination of his employment was "without just cause and \* \* \* not in conformance with the terms of the contract between defendant [Greyhound] \* \* \* and the [Union]" (A. 10). Lockridge amended his subsequent Complaints to eliminate the employer as a party and to drop this Count.<sup>4</sup> His failure to allege any breach of contract claim against the employer, the only party against whom it is available under § 301, is dispositive that there is no such issue in the case.

3. Theoretically, a claim might be stated against a union under § 301 for breach of the duty of fair representation. The fact of this case, however, is there is no allegation in the Second Amended Complaint (or any prior Complaint for that matter) of breach of the duty of fair representation. Originally,

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<sup>4</sup> In his post-trial Brief in the Idaho District Court, Respondent expressly declared, "this case does not involve an action by a Union member against his employer and there is no claim that the employer acted wrongfully. Indeed, it has been held that where the employer has received notice from the union that a member has been suspended or expelled, under the contract with the union, the employer has no choice but to discharge the employee" (Plaintiff's Memorandum Following Trial, 21). In his District Court Reply Brief likewise, Lockridge asserted that "when the employer was notified by the union that plaintiff purportedly had terminated his union membership for failure to pay dues, his discharge from employment was automatic and it was not a burden of the employer to justify the Union action before effecting the discharge" (Plaintiff's Reply Memorandum, 6-7).

Lockridge had included a Count for punitive damages, albeit not on the ground of breach of the duty of fair representation; but even this he dropped in his Second Amended Complaint prior to trial (*cf.* A. 47 with A. 20). As Lockridge made no allegation of breach of the duty of fair representation, *a fortiori* he did not allege, and certainly did not prove, any such willful or deliberate arbitrary discrimination as is necessary for a claim of such breach. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore*, 375 U.S. 335, 348 (1964); *cf. Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-339 (1953). What must be proved is "arbitrary or bad-faith conduct on the part of the Union \* \* \*." *Vaca v. Sipes*, *supra*, at 193.

4. The most that was alleged and proved here is an honest error as to the interpretation of the legal language involved. As the Idaho District Court viewed the facts of this record, the Union "did believe it was technically on sound legal ground in requesting his termination" (A. 53). The Union conduct here was, that Court found, "predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted the same \* \* \*" (A. 66). Likewise, the Court below drew a distinction between "discrimination" and "an honest misunderstanding of the contract," holding that only the latter was involved in this case (A. 106).

In short, the record shows that Lockridge neither alleged nor proved the additional issues which he would nevertheless like this Court to consider as in

the case. But having deliberately taken these issues out of the case as the master of his Complaint and of the evidence which he adduced, Lockridge cannot with any justice now be heard to say that they are sufficiently in the case to sustain the judgment below which quite obviously rests upon the fixed conviction that all such issues are alien in this case and that the only issue herein is the question Petitioners have argued regarding the pre-emption of State law.

5. Lockridge's temerity in now seeking to inject issues he deliberated excised from the case is all the more striking since there is no mystery as to why he restricted his case in this way. He based his claim narrowly and exclusively upon State law—with no Federal issues—to insure that the case would remain in the Idaho Courts and not be subject to removal to, and consideration and decision in, a Federal Court. It is familiar learning that the claim stated in the complaint determines whether a case may be removed.<sup>5</sup>

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<sup>5</sup> " . . . [Q]uestions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, the complaints in the [State] court determine the nature of the suits before it." *Pan Am. Corp. v. Superior Court*, 366 U.S. 656, 662 (1961); *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 672 (1950); and cases cited therein.

As a fundamental matter of Due Process, moreover, the Complaint must provide fair notice to every defendant of the claims which he must meet. Obviously, the entire course of a defendant's preparation for trial and presentation of evidence therein is determined in significant measure by the claims stated in the Complaint. Had Lockridge stated any claims under § 301, Petitioners

Had Lockridge stated any claim under § 301 or cognizable under Federal law the case would have been removed. *Boys Markets v. Clerks Union*, 398 U.S. 235, 245 (1970); *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968).

The high significance of the forum, of the identity and nature of the fact finders, can scarcely be overstated. When there is a Federal question, "the litigant is entitled in the federal courts" to "the initial District Court determination" and not only to review in this Court. *England v. Medical Examiners*, 375 U.S. 411, 416 (1964). "This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." *Ibid.* Removal serves the purposes of protecting federal rights and providing a forum for the accurate and expert interpretation and application of Federal law. *Boys Markets v. Clerks Union, supra*, at 246-247.

Clearly, this applies to the right of appeal also. Had Lockridge not blocked entry into the Federal system, appellate consideration and decision would have been rendered by the Ninth Circuit—a Court familiar with union-security clause issues under the

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would have introduced additional evidence with respect to the understanding and practice of the parties; and as to the good faith and validity of their interpretation of the provisions involved. While we believe that the record even as it stands supports us and not Lockridge, should the Court reach the merits, this does not serve to diminish the fundamental prejudice wreaked upon Petitioners during the trial of this case.

Act.\* It would appear that such issues were ones of first impression in this case to the Court below.

6. Apart from the forums which would have been available, Respondent has deprived Petitioners of trial and decision of any such issues under *Federal* law. Beyond doubt, § 301 issues are to be determined by Federal law. *Avco Corp. v. Aero Lodge 735, supra*, at 560; and cases cited therein. In fact, however, this case has been considered exclusively in terms of the law of Idaho. Had Federal law been applied, the ultimate substantive ruling would clearly have been otherwise. The judgment below rests on a technicality (Pet. Br. 11, n. 6) which the Federal labor law would have held specious and unrealistic, as the NLRB evidently did in *Day* (Pet. Br. 56-58). Moreover, even should Petitioners' interpretation and application of their dues provisions now be deemed erroneous, the Federal law restricts union liability under § 301 to union actions in bad faith. According to the facts of this record, however, Petitioners acted in good faith believing that their interpretation and application of the provisions involved were correct and valid. In the light of Federal law, therefore, Petitioners cannot be held liable. If there is to be decision here on the merits under Federal standards, the judgment below thus cannot survive.

Lockridge has evidently recognized this all along. He has acted throughout on the conviction that his only possible chance to obtain the money recovery which was his solitary objective was in the Courts of his home State and by appealing to State law; and hoping

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\* See, e.g., *N.L.R.B. v. Pacific Transport Lines, Inc.*, 290 F.2d 14 (9th Cir. 1961); *N.L.R.B. v. Technicolor Motion Pic. Corp.*, 248 F.2d 348 (9th Cir. 1957).



upon hope that this Court would either deny review or somehow foresake its well-established preemption doctrines and decisions. For the overriding reality of Respondent's case is that the exercise of State Court jurisdiction which he invoked cannot be sustained compatibly with the decisions of this Court, the Congressional prescriptions in the Act or the imperatives of the Supremacy Clause.

### CONCLUSION

For the reasons stated herein and in the Brief for Petitioners, the judgment below should be reversed and the cause remanded with direction to dismiss this action.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 821, 837.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA ET AL. v. LOCKRIDGE

#### CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 76. Argued December 15, 1970—Decided June 14, 1971

Respondent, who had been discharged from employment on the ground that he had forfeited his good standing membership in petitioner Union by dues arrearage and was therefore subject to termination under the union security clause in the applicable collective-bargaining agreement, brought suit in the state court against the Union and the employer (which was later dropped as a party). The two-count complaint charged (1) that the Union in suspending respondent from membership, which resulted in his loss of employment, acted wrongfully and deprived respondent of the employment with his employer that accrued to him and would accrue to him by reason of his employment, seniority, and experience, and (2) that by the suspension in violation of the Union's constitution and general laws (which constituted a contract between respondent as a union member and the Union) the Union had breached its contract with respondent. The trial court, rejecting the Union's contention that the complaint charged the commission of an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board (NLRB), held that it had jurisdiction under *Machinists v. Gonzales*, 356 U. S. 617, concluded that there had been a breach of contract, for which it awarded money damages for lost wages, and ordered respondent restored to union membership. The Idaho Supreme Court, which also ordered respondent's seniority rights restored, affirmed by a divided vote, concluding that, although the Union's conduct "did most certainly" violate §§ 8 (b)(1)(A) and 8 (b)(2) of the National Labor Relations Act and "probably caused the employer to

## Syllabus

violate § 8(a)(3)," the state courts had jurisdiction because the complaint charged a breach of contract rather than an unfair labor practice; state courts in interpreting contract terms deal with different conduct than would the NLRB in deciding whether a union is discriminating against a member; and *Gonzales, supra*, constitutes an exception that permits state courts to exercise jurisdiction in a case like this. *Held*:

1. Respondent's complaint that the Union had wrongfully interfered with his employment relation involved a matter that was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act and thus was within the exclusive jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U. S. 236. Pp. 10-16.

2. The reasons relied on for the assumption of state court jurisdiction in this case do not suffice to overcome the factors on which the pre-emption doctrine of *Garmon* was predicated, viz., the congressional purpose for effectuating a comprehensive national labor policy to be administered by an expert central agency rather than by a federalized judicial system; the necessity for carrying out that labor policy without specific congressional direction or judicial resolution on a case-by-case basis; and the avoidance of different treatment of the judicial power to deal with conduct that the Act protects from that which the Act prohibits. Pp. 10-21.

(a) Since pre-emption is designed to shield the system from conflicting regulation of conduct, the formal description of that conduct (here the characterization that a breach of contract was involved) is immaterial. Pp. 16-17.

(b) Since the conduct here was arguably protected by § 7 or prohibited by § 8 of the Act, the substantial interests sought to be protected by the pre-emption doctrine are directly involved, and the fact that the Union may have misconstrued its own rules in this case would not be treated by the NLRB as a defense to a claimed violation of § 8 (b) (2). Pp. 17-18.

(c) The *Gonzales* case "was focused on purely internal union matters" and the state courts only had to consider the union's constitution and bylaws, whereas respondent's case turned on the construction of the applicable union security clause, as to which federal concern is pervasive and its regulation complex. Pp. 20-21.

3. Respondent's contention that his action is excepted from the *Garmon* principle as being a suit for the enforcement of a collective-bargaining agreement is without merit since respondent specifically

Syllabus

dropped the employer as a defendant, as is his alternative contention that his suit is essentially one to redress the Union's breach of its duty of fair representation, for to sustain such a claim respondent would have to prove "arbitrary or bad faith conduct on the part of the union," whereas the Idaho Supreme Court found only that the Union had misinterpreted the contract. Pp. 22-25. 93 Idaho 294, 460 P. 2d 719, reversed.

HARLAN, J., delivered the opinion of the Court, in which BLACK, BRENNAN, STEWART, and MARSHALL, JJ., joined. DOUGLAS, J., filed a dissenting opinion. WHITE, J., filed a dissenting a opinion, in which BURGER, C. J., joined. BLACKMUN, J., filed a dissenting statement.



NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 76.—OCTOBER TERM, 1970

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Etc., et al., Peti- tioners, v. Wilson P. Lockridge.	}	On Writ of Certiorari to the Supreme Court of the State of Idaho.
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[June 14, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

*San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), established the general principle that the National Labor Relations Act preempts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act. That decision represents the watershed in this Court's continuing effort to mark the extent to which the maintenance of a general federal law of labor relations combined with a centralized administrative agency to implement its provisions necessarily supplants the operation of the more traditional legal processes in this field. We granted certiorari in this case, 397 U. S. 1006 (1970), because the divided decision of the Idaho Supreme Court demonstrated the need for this Court to provide a fuller explication of the premises upon which *Garmon* rests and to consider the extent to which that decision must be taken to have modified or superseded this Court's earlier efforts to treat with the knotty preemption problem.

## I

Respondent, Wilson P. Lockridge, has obtained in the Idaho courts a judgment for \$32,678.56 against petitioners, Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America and its parent international association,<sup>1</sup> on the grounds that, in procuring Lockridge's discharge from employment, pursuant to a valid union security clause in the applicable collective bargaining agreement, the Union breached a contractual obligation embodied in the Union's constitution and bylaws.

From May 1943 until November 2, 1959, Lockridge was a member of petitioner Union and employed within the State of Idaho as a bus driver for Western Greyhound Lines, or its predecessor. At the time of Lockridge's dismissal from the Union, § 3 (a) of the collective bargaining agreement in effect between the Union and Greyhound provided:

"All present employees covered by this contract shall become members of the ASSOCIATION [Union] not later than thirty (30) days following its effective date and shall remain members as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY." App., 88.

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<sup>1</sup> The local and its parent are, of course, separate legal entities for many purposes and were joined as codefendants below so that each appears as a petitioner in this Court. However both will be jointly described throughout this opinion as "the petitioner" or "the Union" since the parent was held liable on the theory that it was responsible for the acts of the local here involved, not on the basis of any separate acts committed only by the parent.



In addition, § 91 of the Union's Constitution and General Laws provided, in pertinent part, that:

"All dues . . . of the members of this Association are due and payable on the first day of each month for that month . . . . They must be paid by the fifteenth of the month in order to continue the member in good standing. . . . A member in arrears for his dues . . . after the fifteenth day of the month is not in good standing . . . and where a member allows his arrearage . . . to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage . . . to run over the last day of the second month without payment, he does thereby suspend himself from membership in this Association . . . . Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with the terms of the agreement." App., 91-92.

Prior to September 1959, Lockridge's dues had been deducted from his paycheck by Greyhound, pursuant to a checkoff arrangement. During that year, however, Lockridge and a few other employees were released at their request from the checkoff, and thereby became obligated to pay their dues directly to the Union's office in Portland, Oregon. On November 2, 1959, C. A. Bankhead, the treasurer and financial secretary of the union local, suspended Lockridge from membership on the sole ground that since respondent had not yet paid his October dues he was therefore in arrears contrary to § 91. Bankhead simultaneously notified Greyhound of this determination and requested that Lockridge be removed from employment. Greyhound promptly complied. Lock-

ridge's wife received notice of the suspension from membership in early November, while her husband was on vacation, and on November 10, 1959, tendered Bankhead a check to cover respondent's dues for October and November, which Bankhead refused to accept.

This chain of events, combined with the disparity between the above-quoted terms of the collective bargaining agreement and the union constitution and general laws, generated this lawsuit. Lockridge has contended, and the Idaho courts have so held, that because he was less than two months behind in his payment of dues, respondent had not yet "suspended himself from membership" within the meaning of the Union's rules, but instead had merely ceased to be a "member in good standing." And, because the collective-bargaining agreement required only that employees "remain members," those courts held that neither that agreement nor the final sentence of § 91 justified the Union's action in procuring Lockridge's discharge. Therefore, the Idaho courts have held, Lockridge's dismissal violated a promise, implied in law, that the union would not seek termination of his employment unless he was sufficiently derelict in his dues payments to subject him to loss of his job under the terms of the applicable collective bargaining agreement.

Although the trial court made no formal findings of fact on this score,<sup>2</sup> it appears likely that the Union pro-

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<sup>2</sup> Because the Idaho courts treated as irrelevant the actual motivation for the Union's conduct, see Part III *infra*, the trial court did not incorporate in its formal findings of fact and conclusions of law any reference to this checkoff dispute. However, some such evidence was allowed at trial, as well as testimony about the Union's past practice regarding dues-delinquent members, on the theory that this might ultimately bear on the issue whether Lockridge had properly exhausted his administrative remedies. The trial judge in his initial memorandum decision, however, did indicate his belief that "the true facts are" as stated in the text accompanying this footnote.

cured Lockridge's dismissal in the mistaken belief that the applicable union security agreement with Greyhound did, in fact, require employees to remain members in good standing and that the Union insisted on what it thought was a technically valid position because it was piqued by Lockridge's obtaining his release from the checkoff. The trial court did find specifically that "almost without exception" it had been the past practice of this local division of the Union merely to suspend delinquent members from service, rather than stripping them of membership, and to put them back to work without loss of seniority when their dues were paid.

Lockridge initially made some efforts, with Bankhead's assistance, to obtain reinstatement in the Union but these proved unsuccessful. No charges were filed before the National Labor Relations Board.<sup>3</sup> Instead, Lockridge filed suit in September 1960 in the Idaho State District Court against the Union and Greyhound, which was later dropped as a party. That court, on the Union's motion,

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<sup>3</sup> It appears that at least one other person, Elmer Day, was similarly suspended from membership in the Union and discharged from Greyhound. On November 12, 1959, he filed a formal charge with the Board's Regional Director. On December 15, 1959, the Director advised Day, by letter, that "it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters." The Director further informed Day that "you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board . . . ." Day did not seek review. Instead, he filed suit against the Union in the Circuit Court of Multnomah County, Oregon, for tortious interference with employment, and obtained a jury award for general and punitive damages. On appeal, the Supreme Court of Oregon (two judges dissenting) reversed, holding the conduct complained of to be within the Board's exclusive jurisdiction. *Day v. Northwest Division 1055*, 238 Ore. 624, 389 P. 2d 42. (Some of these facts are taken from the dissenting opinion in that case).

dismissed the complaint in April 1961 on the grounds that it charged the Union with the commission of an unfair labor practice and consequently fell within the exclusive jurisdiction of the NLRB. A year later, the Idaho Supreme Court reversed, holding that the state courts had jurisdiction under this Court's decision in *Association of Machinists v. Gonzales*, 356 U. S. 617 (1958), and remanded for trial on the merits. *Lockridge v. Amalgamated Assn. of St. El. Ry. & M. C. Emp.*, 84 Idaho 201, 369 P. 2d 1006 (1962).

In 1965 Lockridge filed a second amended complaint which has since served as the basis for this lawsuit. Its first count alleged that

"in suspending plaintiff from membership in the [Union] which resulted in plaintiff's loss of employment, the [Union] . . . acted wantonly, wilfully and wrongfully and without just cause, and . . . deprived plaintiff of his . . . employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience, and plaintiff has been harassed and subject to mental anguish . . . ." App., 46-47.

Count Two, sounding squarely in contract, alleged that

"in wrongfully suspending plaintiff from membership in the [Union], which resulted in plaintiff's discharge from employment with the Greyhound Corporation, the [Union] . . . acted wrongfully, wantonly, wilfully and maliciously and without just cause and violated the constitution and general laws of the [Union] which constituted a contract between the plaintiff as a member thereof and the [Union], and as a result of said breach of contract plaintiff has been deprived of his . . . employment with . . . Greyhound Corporation . . . and plaintiff has been embarrassed and subjected to mental anguish . . . ." App., 48.

The complaint sought damages in the amount of \$212,000 "and such other and further relief as to the court may appear meet and equitable in the premises." *Ibid*.

After trial, the Idaho District Court found the facts as stated above and held that they did, indeed, amount to a breach of contract. The court felt itself bound by the prior determination of the Idaho Supreme Court to consider that it might properly exercise jurisdiction over the controversy and to "decide [the] case on the theories of" *Machinists v. Gonzales, supra*. Consequently, the trial judge concluded that Lockridge was entitled to a decree restoring him to membership in the Union, "although plaintiff has never sought such a remedy." Lockridge was also awarded \$32,678.56 as compensation for wages actually lost due to his dismissal from Greyhound's employ, but his requests for future damages arising from continued loss of employment, compensation for loss of seniority or fringe benefits, and punitive damages were all denied. On appeal the Idaho Supreme Court affirmed, over one dissenting vote, except that it also ordered restoration of respondent's seniority rights. 93 Idaho 294, 460 P. 2d 719 (1969). Having granted certiorari for the reasons stated at the outset of this opinion, we now reverse.

## II

### A

On the surface, this might appear to be a routine and simple case. Section 8 (b)(2) of the National Labor Relations Act makes it an unfair labor practice for a union

"to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some

ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8 (b) (1) (A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the right guaranteed in section 7," which includes the right not only "to form, join or assist labor organizations" but also "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Section 8 (a)(3) makes it an unfair labor practice for an employer

"by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . : *Provided* further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Further, in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959), we held that the National Labor Relations Act preempts the jurisdiction of state and federal courts to regulate conduct "arguably subject

to § 7 or § 8 of the Act." On their face, the above-quoted provisions of the Act at least arguably either permit or forbid the union conduct dealt with by the judgment below. For the evident thrust of this aspect of the federal statutory scheme is to permit the enforcement of union security clauses, by dismissal from employment, only for failure to pay dues. Whatever other sanctions may be employed to exact compliance with those internal union rules unrelated to dues payment, the Act seems generally to exclude dismissal from employment. See *Radio Officers' Union v. National Labor Relations Bd.*, 347 U. S. 17 (1954). Indeed, in the course of rejecting petitioner's preemption argument, the Idaho Supreme Court stated that, in its opinion, the Union "did most certainly violate 8 (b)(1)(A), did most certainly violate 8 (b)(2) . . . and probably caused the employer to violate 8 (a)(3)." 93 Idaho, at —, 460 P. 2d, at 724. Thus, given the broad preemption principle enunciated in *Garmon*, the want of state court power to resolve Lockridge's complaint might well seem to follow as a matter of course.

The Idaho Supreme Court, however, concluded that it nevertheless possessed jurisdiction in these circumstances. That determination, as we understand it, rested upon three separate propositions, all of which are urged here by respondent. The first is that the Union's conduct was not only an unfair labor practice, but a breach of its contract with Lockridge as well. "Pre-emption is not established simply by showing that the same facts will establish two different legal wrongs." 93 Idaho, at —, 460 P. 2d, at 725. In other words *Garmon*, the state court and respondent assert, states a principle applicable only where the state law invoked is designed specifically to regulate labor relations; it has no force where the State applies its general common law of contracts to resolve disputes between a union and its members. Sec-



only, it is urged that the facts that might be shown to vindicate Lockridge's claim in the Idaho state courts differ from those relevant to proceedings governed by the National Labor Relations Act. It is said that the conduct regulated by the Act is union and employer discrimination; general contract law takes into account only the correctness of competing interpretations of the language embodied in agreements. 93 Idaho, at —, 460 P. 2d, at 728-729. Finally, there recurs throughout the state court opinion, and the arguments of respondent here, the theme that the facts of the instant case render it virtually indistinguishable from *Association of Machinists v. Gonzales*, 356 U. S. 617 (1958), where this Court upheld the exercise of state court jurisdiction in an opinion written only one Term prior to *Garmon*, by the author of *Garmon* and which was approvingly cited in the *Garmon* opinion itself.

We do not believe that any of these arguments suffice to overcome the plain purport of *Garmon* as applied to the facts of this case. However, we have determined to treat these considerations at some length because of the understandable confusion, perhaps in a measure attributable to the previous opinions of this Court, they reflect over the jurisprudential bases upon which the *Garmon* doctrine rests.

## B

The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. A full understanding of the particular preemption rule set forth in *Garmon* especially requires, we think, appreciation of the precise nature and extent of the potential for in-

jurious conflict that would inhere in a system unaffected by such a doctrine, and also the setting in which the general problem of accommodating conflicting claims of competence to resolve disputes touching upon labor relations has been presented to this Court.

The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.<sup>4</sup> The principle of preemption that informs our general national labor law was born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme.

As it appears to us, nothing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law. Nor would an approach suffice that sought merely to avoid disparity in the content of proscriptive behavioral rules.

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<sup>4</sup> For a discussion of these problems that formed a backdrop for the federal act, see H. Wellington, *Labor and the Legal Process*, c. 1 (1968). See also Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1302-1304, 1315-1317 (1954).

As the Court observed in *Garner v. Teamsters Local Union*, 346 U. S. 485, 490-491 (1953), Congress in establishing overriding federal supervision of labor law

"did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision . . . . Congress evidently determined that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy. As the passage from *Garner* indicates, in matters of dispute concerning labor relations a simple recitation of the formally prescribed rights and duties of the parties constitutes an inadequate description of the actual process for settlement Congress has provided. The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. "Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration." *Garmon*, 359 U. S., at 243.

The rationale for preemption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system.<sup>8</sup> Thus, that a local court, while adjudicating a

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<sup>8</sup> This appears to be the precise point of difference between our assessment of congressional purpose and that of Mr. JUSTICE WHITE. While it is not clear how he would treat the *Garmon* principle where the conflict is between unions and employers, he expressly argues that state power to regulate union conduct harmful to its members that is within the compass of the National Labor Relations Act should be unlimited, except by the obvious qualification that States may not punish conduct affirmatively protected by federal law. Thus, in his view, when it enacted the NLRA, Congress would have fully served those interests it intended to promote in the conduct of union-member relations had it simply declared that the States may not proscribe certain, defined conduct. Certainly, he is prepared to adopt a judicial construction of the Act that is consistent only with such a view of congressional intent. At bottom, what his position seems to imply is that giving the National Labor Relations Board jurisdiction to enforce federal law regulating the use of union security clauses was largely, if not wholly, without rational purpose. As we have explained at some length above, we do not understand how courts may properly take such a limited view of congressional intent in the face of legislation that is in fact much more wide-ranging, and in the absence of a contrary expression of intention from Congress itself.

Further, Mr. JUSTICE WHITE apparently regards the remedial aspects of the federal scheme as unimportant to those who designed it. For example, assuming *arguendo* that petitioner's conduct was prohibited under both federal and state law, he would deem it of no national significance if one State punished such conduct with a jail sentence, and another utilized punitive damages, while the NLRB merely awarded back pay. His position apparently is that Congress considered any state tribunal equally capable, with the Board, of

labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent.

A second factor that has played an important role in our shaping of the preemption doctrine has been the necessity to act without specific congressional direction. The precise extent to which state law must be displaced to achieve those unifying ends sought by the national legislature has never been determined by the Congress. This has, quite frankly, left the Court with few available options. We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States. Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard. Equally important, such a principle would fail to take account of

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assessing the appropriateness of a given remedy and was unconcerned about disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

For these reasons, MR. JUSTICE WHITE's analogies do not persuade us. Unlike the problem here under review, Congress did not put enforcement of the LMRDA into the hands of the Board. And it affirmatively expressed an intention that the Board not possess preemptive jurisdiction over suits to enforce collective bargaining agreements. See Part III, *infra*.

the fact, as discussed above, that simple congruity of legal rules does not, in this area, prove the absence of untenable conflict. Further, it is surely not possible for this Court to treat the National Labor Relations Act section by section, committing enforcement of some of its provisions wholly to the NLRB and others to the concurrent domain of local law. Nothing in the language or underlying purposes of the Act suggests any basis for such distinctions. Finally, treating differently judicial power to deal with conduct protected by the Act from that prohibited by it would likewise be unsatisfactory.<sup>6</sup> Both areas equally involve conduct whose legality is governed by federal law, the application of which Congress committed to the Board, not courts.

This is not to say, however, that these inherent limitations on this Court's ability to state a workable rule that comports reasonably with apparent congressional objectives are necessarily self-evident. In fact, varying approaches were taken by the Court in initially grappling with this preemption problem. Thus, for example, some early cases suggested the true distinction lay between judicial application of general common law, which was permissible, as opposed to state rules specifically designed to regulate labor relations, which were preempted. See, *e. g.*, *Automobile Workers v. Russell*, 356 U. S. 634, 645 (1958). Others made preemption turn on whether the States purported to apply a remedy not provided for by the federal scheme, *e. g.*, *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 479-480 (1955), while in still others the Court undertook a thorough scrutiny of the federal Act

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<sup>6</sup> The objections raised to this latter point, *post*, at 17-23 (WHITE, J., dissenting), seem largely irrelevant to the case under review. This is not a situation where the sole argument for preemption is that the union's conduct was arguably protected. Clearly, if the facts are as respondent believes them to be, there is ample reason to conclude that petitioner probably committed an unfair labor practice.

to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions, *e. g.*, *Automobile Workers v. Wisconsin Employment Relations Bd.*, 336 U. S. 245 (1949). For the reasons outlined above none of these approaches proved satisfactory, however, and each was ultimately abandoned. It was, in short, experience—not pure logic—which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.

The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in *Garmon*, 359 U. S., at 244:

“When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.”

### C

Upon these premises, we think that *Garmon* rather clearly dictates reversal of the judgment below. None of the propositions asserted to support that judgment can withstand an application, in light of those factors that compelled its promulgation, of the *Garmon* rule.

Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable. Preemption, as



shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law was explicitly rejected in *Garmon* itself. 359 U. S., at 244.

The second argument, closely related to the first, is that the state courts, in resolving this controversy, did deal with different conduct, *i. e.*, interpretation of contractual terms, than would the NLRB which would be required to decide whether the Union discriminated against Lockridge. At bottom, of course, the Union's action in procuring Lockridge's dismissal from employment is the conduct which Idaho courts have sought to regulate. Thus, this second point demonstrates at best that Idaho defines differently what sorts of such union conduct may permissibly be proscribed. This is to say either that the regulatory schemes, state and federal, conflict (in which case preemption is clearly called for) or that Idaho is dealing with conduct to which the federal Act does not speak. If the latter assertion was intended, it is not accurate. As pointed out in Part II A, *supra*, the relevant portions of the Act operate to prohibit a union from causing or attempting to cause an employer to discriminate against an employee because his membership in the union has been terminated "on some ground other than" his failure to pay those dues requisite to membership. This has led the Board routinely and frequently to inquire into the proper construction of union regulations in order to ascertain whether the union properly found an employee to have been derelict in his dues-paying responsibilities, where his discharge was procured on the asserted grounds of nonmembership in the union. See, *e. g.*, *NLRB v. Allied Independent Union*, 238 F. 2d

120 (CA7 1956); *NLRB v. Leece-Neville Co.*, 330 F. 2d 242 (CA6 1964); *Communications Workers v. NLRB*, 215 F. 2d 835 (CA2 1954); *NLRB v. Spector Freight System, Inc.*, 273 F. 2d 272 (CA8 1960). See generally, 3 CCH, Labor Law Rptr., ¶ 4525. That a union may in good faith have misconstrued its own rules has not been treated by the Board as a defense to a claimed violation of § 8 (b) (2). In the Board's view, it is the fact of misapplication by a union of its rules, not the motivation for that discrimination, that constitutes an unfair labor practice. See, in addition to the authorities cited above, *Electrical, Radio & Machine Workers, v. NLRB*, 307 F. 2d 679, 684 (CA9 1962), and *Teamsters Local v. NLRB*, 365 U. S. 667, 681 (1961) (concurring opinion).

From the foregoing, then, it would seem that this case indeed represents one of the clearest instances where the *Garmon* principle, properly understood, should operate to oust state court jurisdiction. There being no doubt that the conduct here involved was arguably protected by § 7 or prohibited by § 8 of the Act, the full range of very substantial interests the preemption doctrine seeks to protect are directly implicated here.

However, a final strand of analysis underlies the opinion of the Idaho Supreme Court, and the position of respondent, in this case. Our decision in *Association of Machinists v. Gonzales*, 356 U. S. 617 (1958), it is argued, fully survived the subsequent reorientation of preemption doctrine effected by the *Garmon* decision, providing, in effect, an express exception for the exercise of judicial jurisdiction in cases such as this.

The fact situation in *Gonzales* does resemble in some relevant regards that of the instant case. There the California courts had entertained a complaint by an individual union member claiming he had been expelled from his union in violation of rights conferred upon him by the union's constitution and bylaws, which allegedly consti-

tuted a contract between him and his union. *Gonzales* prevailed on his breach of contract theory and was awarded damages for wages lost due to the revocation of membership as well as a decree providing for his reinstatement in the union. This Court confirmed the California courts' power to award the monetary damages, the only aspect of the action below challenged in this Court. The primary rationale for the result reached was that California should be competent to "fill out," 356 U. S., at 620, the reinstatement remedy by utilizing "the comprehensive relief of equity," *id.*, at 621, which the Board did not fully possess. Secondly, it was said that the lawsuit "did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8 (b)(2)." *Id.*, at 622.

Although it was decided only one Term subsequent to *Gonzales*, *Garmon* clearly did not fully embrace the technique of the prior case. It was precisely the realization that disparities in remedies and administration could produce substantial conflict, in the practical sense of the term, between the relevant state and federal regulatory schemes and that this Court could not effectively and responsibly superintend on a case-by-case basis the exertion of state power over matters arguably governed by the National Labor Relations Act that impelled the somewhat broader formulation of the preemption doctrine in *Garmon*. It seems evident that the full-blown rationale of *Gonzales* could not survive the rule of *Garmon*. Nevertheless, *Garmon* did not cast doubt upon the result reached in *Gonzales*, but cited it approvingly as an example of the fact that state court jurisdiction is not preempted "where the actively regulated was a merely peripheral concern of the . . . Act." 359 U. S., at 243.

Against this background, we attempted to define more precisely the reach of *Gonzales* within the more compre-

hensive framework *Garmon* provided in the companion cases of *Plumbers Union v. Borden*, 373 U. S. 690 (1963), and *Iron Workers v. Perko*, 373 U. S. 701 (1963).

Borden had sued his union in state courts, alleging that the union had arbitrarily refused to refer him to a particular job which he had lined up. He recovered damages, based on lost wages, on the grounds that this conduct constituted both tortious interference with his right to contract for employment and a breach of promise, implicit in his membership arrangement with the union, not to discriminate unfairly against any member or deny him the right to work. Perko had obtained a large money judgment in the Ohio courts on proof that the union had conspired, without cause, to deprive him of employment as a foreman by demanding his discharge from one such position he had held and representing to others that his foreman's rights had been suspended. We held both Perko's and Borden's judgments inconsistent with the *Garmon* rule essentially for the same reasons we have concluded that Lockridge could not, consistently with the *Garmon* decision, maintain his lawsuit in the state courts. We further held there was no necessity to "consider the present vitality of [the *Gonzales*] rationale in the light of more recent decisions," because in those cases, unlike *Gonzales*, "the crux of the action[s] . . . concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." Because no specific claim for restoration of membership rights had been advanced, "there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." *Perko*, 373 U. S., at 705. See also *Borden*, 373 U. S., at 697.

In sum, what distinguished *Gonzales* from *Borden* and *Perko* was that the former lawsuit "was focused on purely internal union matters," *Borden*, *supra*, at 697, a subject

the National Labor Relations Act leaves principally to other processes of law. The possibility that, in defining the scope of the union's duty to Gonzales, the state courts would directly and consciously implicate principles of federal law was at best tangential and remote. In the instant case, however, this possibility was real and immediate. To assess the legality of his union's conduct toward Gonzales the California courts needed only to focus upon the union's constitution and by-laws. Here, however, Lockridge's entire case turned upon the construction of the applicable union security clause, a matter as to which, as shown above, federal concern is pervasive and its regulation complex. The reasons for Gonzales' deprivation of union membership had nothing to do with matters of employment, while Lockridge's cause of action and claim for damages was based solely upon the procurement of his discharge from employment. It cannot plausibly be argued, in any meaningful sense, that Lockridge's lawsuit "was focused upon purely internal matters." Although nothing said in *Garmon* necessarily suggests that States cannot regulate the general conditions which unions may impose on their membership, it surely makes crystal clear that *Gonzales* does not stand for the proposition that resolution of any union-member conflict is within state competence so long as one of the remedies provided is restoration of union membership. This much was settled by *Borden* and *Perko*, and it is only upon such an unwarrantably broad interpretation of *Gonzales* that the judgment below could be sustained.

### III

The preemption doctrine we apply today is, like any other purposefully administered legal principle, not without exception. Those same considerations that underlie *Garmon* have led this Court to permit the exercise of judicial power over conduct arguably protected or pro-

hibited by the Act where Congress has affirmatively indicated that such power should exist, *Smith v. Evening News*, 371 U. S. 195 (1962); *Teamsters v. Morton*, 377 U. S. 252 (1964), where this Court cannot, in spite of the force of the policies *Garmon* seeks to promote, conscientiously presume that Congress meant to intrude so deeply into areas traditionally left to local law, e. g., *Linn v. Plant Guard Workers*, 383 U. S. 53 (1966); *Automobile Workers v. Russell*, 356 U. S. 634 (1958),<sup>7</sup> and where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes, *Vaca v. Sipes*, 386 U. S. 171 (1967).<sup>8</sup>

In his brief before this Court, respondent has argued for the first time since this lawsuit was started that two of these exceptions to the *Garmon* principle independently justify the Idaho courts' exercise of jurisdiction over this controversy. First, Lockridge contends that his action, properly viewed, is one to enforce a collective-

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<sup>7</sup> *Garmon* itself recognized that *Russell* permitted state courts "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." 359 U. S., at 247. However, whereas the Court in *Russell* had justified that result principally upon the broad grounds that state law not specifically relating to labor relations *per se* was not preempted by the Act, the Court in *Garmon* restated this result as dictated by "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace [which] is not overridden in the absence of clearly expressed congressional direction." *Ibid.* It is, of course, this latter and narrower rationale that survives today.

<sup>8</sup> It may be that a similar exception would arise where the Board affirmatively indicates that, in its view, preemption would not be appropriate. Cf. *post*, at 2-4, 11 n. 2 (WHITE, J., dissenting). As the Board's *amicus* brief in the instant case makes clear, no such question is now before us.

bargaining agreement. Alternatively, he asserts the suit, in essence, was one to redress petitioner's breach of its duty of fair representation. As will be seen, these contentions are somewhat intertwined.

In § 301 of the Taft-Hartley Act, Congress authorized federal courts to exercise jurisdiction over suits brought to enforce collective bargaining agreements. We have held that such actions are judicially cognizable, even where the conduct alleged was arguably protected or prohibited by the National Labor Relations Act because the history of the enactment of § 301 reveals that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of law.'" *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502, 513 (1962). It is firmly established, further, that state courts retain concurrent jurisdiction to adjudicate such claims, *Charles Dowd Box Co.*, *supra*, and that individual employees have standing to protect rights conferred upon them by such agreements, *Smith v. Evening News*, *supra*; *Humphrey v. Moore*, 375 U. S. 335 (1964).

Our cases also clearly establish that individual union members may sue their employers under § 301 for breach of a promise embedded in the collective bargaining agreement that was intended to confer a benefit upon the individual. *Smith v. Evening News*, *supra*. Plainly, however, this is not such a lawsuit. Lockridge specifically dropped Greyhound as a named party from his initial complaint and has never reasserted a right to redress from his former employer.

This Court has further held in *Humphrey v. Moore*, 375 U. S. 335 (1964), that § 301 will support, regardless of otherwise applicable preemption considerations, a suit in the state courts by a union member against his union that seeks to redress union interference with rights conferred on individual employees by the employer's promises in the collective-bargaining agreement, where it is



proved that such interference constituted a breach of the duty of fair representation. Indeed, in *Vaca v. Sipes*, 386 U. S. 171 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement. Perhaps Count One of Lockridge's second amended complaint could be construed to assert either or both of these theories of recovery. However, it is unnecessary to pass upon the extent to which *Garmon* would be inapplicable if it were shown that in these circumstances petitioner not only breached its contractual obligations to respondent, but did so in a manner that constituted a breach of the duty of fair representation. For such a claim to be made out, Lockridge must have proved "arbitrary or bad faith conduct on the part of the union." *Vaca v. Sipes, supra*, at 193. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore, supra*, at 348. Whether these requisite elements have been proved is a matter of federal law. Quite obviously, they were not even asserted to be relevant in the proceedings below. As the Idaho Supreme Court stated in affirming the verdict for Lockridge, "[t]his was a misinterpretation of a contract. Whatever the underlying motive for expulsion might have been, this case has been submitted and tried on the interpretation of the contract, not on a theory of discrimination." Thus, the trial judge's conclusion of law in sustaining Lockridge's claim specifically incorporates the assumption that the Union's "acts . . . were predicated solely upon the ground that [Lockridge] had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted

[it] . . . .” App., 66. Further, the trial court excluded as irrelevant petitioner’s proffer of evidence designed to show that the Union’s interpretation of the contract was reasonably based upon its understanding of prior collective bargaining agreements negotiated with Greyhound. Transcript of Trial, at 259–260.

Nor can it be fairly argued that our resolution of respondent’s final contentions entails simply attaching variegated labels to matters of equal substance. We have exempted § 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act. The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of *Smith v. Evening News* is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself.

Similarly, this Court’s refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not be otherwise regulated

by the substantive federal law. And the fact that the doctrine was originally developed and applied by courts, after passage of the Act, and carries with it the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight. *Vaca v. Sipes*, *supra*, at 180-181. So viewed, the duty of fair representation, properly defined, operates to limit the scope of *Garmon* where the sheer logic of the preemption principle might otherwise cause it to be extended to a point where its operation might be unjust. *Vaca v. Sipes*, *supra*, at 182-183. If, however, the congressional policies *Garmon* seeks to promote are not to be swallowed up, the very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained.

#### IV

Finally, we deem it appropriate to discuss briefly two other considerations underlying the conclusion we have reached in this case. First, our decision must not be taken as expressing any views on the substantive claims of the two parties to this controversy. Indeed, our judgment is, quite simply, that it is not the task of federal or state courts to make such determinations. Secondly, in our explication of the reasons for the *Garmon* rule, and the various exceptions to it, we noted that, although largely of judicial making, the labor relations preemption doctrine finds its basic justification in the presumed intent of Congress. While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are

born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation preempts state law strongly support our conclusion that the basic tenets of *Garmon* should not be disturbed.\*

For the reasons stated above, the judgment below is

*Reversed.*

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\* Indeed, MR. JUSTICE WHITE's dissenting opinion fails to demonstrate the need for such a departure from our traditional judicial role. On the contrary, he affirmatively establishes that Congress has taken an active, conscious role in apportioning power to deal with controversies implicating federal labor law among various competent tribunals.

The American Medical Association is a non-profit corporation organized for the purpose of promoting the interests of the medical profession and the public. It was organized in 1847 and has since that time been the leading organization of the medical profession in the United States. The Association is composed of more than 50,000 members, who are physicians, surgeons, dentists, and other medical practitioners. The Association's principal activities are the publication of the Journal of the American Medical Association, the holding of annual conventions, and the representation of the medical profession in legislative and executive bodies.

The Journal of the American Medical Association is a weekly publication which contains a wide variety of material of interest to the medical profession. It includes original articles, reviews, and reports on the latest developments in medicine. The Journal is also a forum for the expression of views on medical and public health questions. The Association's annual convention is a major event in the medical calendar, and is attended by thousands of physicians and other medical practitioners from all over the United States and foreign countries. The Association also maintains a permanent office in Chicago, which serves as a center for the coordination of its various activities.

The Association's primary concern is the promotion of the highest standards of medical practice and the improvement of the health of the public. To this end, it has established a number of committees and commissions, which are charged with the task of investigating and reporting on various medical and public health problems. The Association has also been successful in securing the enactment of many important laws and regulations, which have helped to protect the public and to improve the medical profession. The Association's efforts have been recognized by the public and by the government, and it has received many awards and honors for its contributions to medicine and public health.

The Association's Journal is one of the most widely read and respected medical journals in the world. It is a valuable source of information for all medical practitioners, and it is also a valuable resource for the public. The Association's annual convention is a major event in the medical calendar, and it is attended by thousands of physicians and other medical practitioners from all over the United States and foreign countries. The Association's permanent office in Chicago is a center for the coordination of its various activities, and it serves as a focal point for the medical profession in the United States.

# SUPREME COURT OF THE UNITED STATES

No. 76.—OCTOBER TERM, 1970

Amalgamated Association of  
Street, Electric Railway and  
Motor Coach Employees of  
America, Etc., et al., Peti-  
tioners,

v.

Wilson P. Lockridge.

On Writ of Certiorari  
to the Supreme Court  
of Idaho.

[June 14, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I would affirm this judgment on the basis of *Machinists v. Gonzales*, 356 U. S. 617, rather than overrule it. I would not extend *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, so as to make Lockridge, the employee, seek his relief in faraway Washington, D. C., from the National Labor Relations Board.

When we hold that a grievance is "arguably" within the jurisdiction of the National Labor Relations Board and remit the individual employee to the Board for remedial relief, we impose a great hardship on him, especially where he is a lone individual not financed out of a lush treasury. I would allow respondent recourse to litigation in his home town tribunal and not require him to resort to an elusive remedy in distant and remote Washington, D. C., which takes money to reach.

He has six months within which to file an unfair labor practice charge with the Regional Director and serve it upon the other party. If he does not file within six months, the claim is barred. 29 U. S. C. § 160 (b). The charge must be in writing and contain either a declaration that contents are true to best of his knowledge, or else a notarization. 29 CFR § 101.2. When the charge is received, it is filed, docketed, and given a number (29

CFR § 101.4) and assigned to a member of field staff for investigation. 29 CFR § 101.4.

Following the investigation, the Regional Director makes his decision. "If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the Regional Director recommends withdrawal of the charge by the person who filed." 29 CFR § 101.5. If the complaining party does not withdraw the charge, the Regional Director dismisses it. 29 CFR § 101.6. Following dismissal, the complainant has 10 days to appeal the decision to the General Counsel who reviews the decision. 29 CFR § 101.6. If the General Counsel holds against the complaining party and refuses to issue an unfair labor practice complaint, the decision is apparently unreviewable. Cox & Bok, *Labor Law* 138 (3d ed. 1969); *General Drivers Local 866 v. NLRB*, 179 F. 2d 492.

From the viewpoint of an aggrieved employee, there is not a trace of equity in this long-drawn, expensive remedy. If he musters the resources to exhaust the administrative remedy, the chances are that he too will be exhausted. If the General Counsel issues a complaint, then he stands in line for some time waiting for the Board's decision.<sup>1</sup> If the General Counsel refuses to act,

<sup>1</sup> For the backlog of the Board see 34th Annual Report, CCH 1969. Table 1 shows the following number of Unfair Labor Practice cases:

Pending July 1, 1968.....	7,377
Received fiscal 1969.....	18,651
On docket fiscal 1969.....	26,028
Closed fiscal 1969.....	18,939
Pending June 30, 1969.....	7,089

Table 8 shows that the 18,939 Unfair Labor Practice cases in 1969 were as follows:

Before issuance of complaint.....	16,135
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[Footnote 1 continued on page 3]



then the employee is absolutely without remedy. For as *Garmon* states:

"The Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U. S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States power to act." 359 U. S., at 245-246.

From this it follows that if the General Counsel refuses to act, no one may act and the employee is barred from

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After issuance of complaint, before opening of hearing..	1,251
After hearing opened, before issuance of Trial Examiner's decision .....	186
After Trial Examiner's decision, before issuance of Board decision .....	134
After Board order adopting Trial Examiner's decision in absence of exceptions.....	131
After Board decision, before circuit court decree.....	606
After circuit court decree, before Supreme Court action..	427
After Supreme Court action.....	69
Of the foregoing—	
31% were dismissed before complaint.	
24.9% were settled.	
36% were withdrawn.	
In only 5.7% did the Board issue orders. <i>Id.</i> , p. 4.	

relief in either state or federal court.<sup>2</sup> See *Day v. Northwest Division 1055*, 238 Ore. 624, 389 P. 2d 42, cert. denied 379 U. S. 878.

When we tell a sole individual that his case is "arguably" within the jurisdiction of the Board, we in practical effect deny him any remedy. I repeat what I said before, "When the basic dispute is between a union and an employer, any hiatus that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely." *Association of Journeymen v. Borden*, 373 U. S. 690, 699-700 (dissenting).

*Garmon* involved a union-employer dispute. It should not be extended to the individual employee who seeks a remedy for his grievance against his union.

The complaint in this state court suit sought damages from the union for its action in causing the employer to discharge him pursuant to the union-security clause in the collective-bargaining agreement. It also asked for "such other and further relief as to the court may appear meet and equitable in the premises."

It appears that the collective agreement only required Lockridge to be a *member* of the union as a condition of employment, not a *member in good standing*. Lockridge, it appears, was one month delinquent in payment of dues but was still a member.

The case for relief by Lockridge in a state court is as strong as, if not stronger than, the case of Gonzales. Lockridge, who was refused employment because of the union's representations to the employer, had never been expelled from the union. On the other hand, Gonzales had been expelled from the union because he brought

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<sup>2</sup> Since we have yet to rule on the reviewability of the refusal of the General Counsel to act, that route might be open although at present the authority is to the contrary. See Cox & Bok, *Labor Law* 138 (3d ed. 1969).

assault and battery charges against a representative of the union. He sued for restoration of membership and for damages. The state court found that the union had breached its contract with the employee and ordered him reinstated and awarded him damages. 356 U. S., at 618. We sustained the state court, saying that "the subject matter of the litigation . . . was the breach of a contract governing the relations" between the employee and the union and that the "suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under section 8 (b) (2)." *Id.*, at 621-622. We held that in those circumstances the state court had power to order the employee reinstated to membership and was not deprived of jurisdiction to "fill out" his remedy by awarding damages. *Id.*, at 620-621.

Whether in the present case the discharge of Lockridge was "arguably" an unfair labor practice within the meaning of *Garmon* is irrelevant. The reason is that the Board would not have the power to supply the total remedy which Lockridge seeks even if the employer had committed an unfair labor practice. True, the Board has authority to award back pay<sup>3</sup> but it has no authority to award damages beyond back pay. Moreover, under *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, the union is in a fiduciary relation to its members. As we stated in *Vaca v. Sipes*, 386 U. S. 171, 177:

"Under this doctrine, the exclusive agent's statutory authority to represent all members of a desig-

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<sup>3</sup> Under § 10 (c) of the Act the Board can award back pay against an employer, *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, and the Board will order back pay against a union where it causes an employer to discriminate against an employee. See *International Association of Heat & Frost Insulators, Local 84*, 146 N. L. R. B. 660; *United Mine Workers (Blue Diamond Coal Co.)*, 143 N. L. R. B. 795.

nated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

We emphasized in the *Sipes* case that the *Garmon* rule was "not applicable to cases involving alleged breaches of the union's duty of fair representation." *Id.*, at 181. We held that in this type of case Congress did not intend "to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." *Id.*, at 183.

As demonstrated by MR. JUSTICE WHITE in his dissent in this case, the exceptions to the preemption rule are so many and so important that they make amazing the Court's "uncritical resort to it."

The wrongs suffered by Lockridge stemmed from the union's breach of its contract. Rather than overrule *Gonzales*, we should reaffirm what we said there:

"... the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .' 61 Stat. 142, 29 U. S. C. § 158 (b) (1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly

ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement of the national policy, would require more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act." 356 U. S., at 620.

Where the quarrel between the employee and the union is over a particular job, his remedy is before the Board. *Plumbers Union v. Borden*, 373 U. S. 690; *Iron Workers v. Perko*, 373 U. S. 701. But where the union contract is breached by expulsion of the employee, as alleged in *Gonzales*, or where he is wrongfully treated as no longer being a member of the union (which is the present case) the suit lies in the state court for damages, for declaratory or other relief that he still is a member, and for such other remedies as may be appropriate.

While I joined the dissent in *Gonzales*, experience under *Garmon* convinces me that we should not apply its rule to the grievances of individual employees against a union. I would affirm the judgment below.



# SUPREME COURT OF THE UNITED STATES

No. 76.—OCTOBER TERM, 1970

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Etc., et al., Peti- tioners, v. Wilson P. Lockridge.	}	On Writ of Certiorari to the Supreme Court of Idaho.
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[June 14, 1971]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

Like MR. JUSTICE DOUGLAS, I would neither overrule nor eviscerate *Int'l Assn. of Machinists v. Gonzales*, 356 U. S. 617 (1958). In light of present statutory law and congressional intention gleaned therefrom, state courts should not be foreclosed from extending relief for union deprivation of members' state law rights under the union constitution and bylaws. Even if I agreed that the doctrine of *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236, properly preempts such union member actions based on state law where the challenged conduct is arguably an unfair labor practice, I could not join the opinion of the Court since it unqualifiedly applies the same doctrine where the conduct of the union is only arguably protected under the federal law.

The *Garmon* doctrine, which is today reaffirmed and extended, has as its touchstone the presumed congressional goal of a uniform national labor policy; to this end, the Court has believed, the administration of that policy must insofar as is possible be in the hands of a single, centralized agency. In many ways I have no quarrel with this view. Many would agree that as a general matter some degree of uniformity is preferable to the conflicting voices of 50 States, particularly in view



of the structure of industrial and commercial activities in this country. Congress determined as much when it enacted the National Labor Relations Act.

But it is time to recognize that Congress has not federalized the entire law of labor relations, even labor-management relations, and that within the area occupied by federal law neither Congress, this Court nor the National Labor Relations Board itself has, in the name of uniformity, insisted that the agency always be the exclusive expositor of federal policy in the first instance. To put the matter in proper perspective it will be helpful to set down some of the important contexts in which federal law is implemented by the courts or other institutions without the prior intervention of the Board, as well as those in which state rather than federal law is permitted to operate. Part I, following, undertakes this task. Against that background, Part II deals with union member actions against their union and Part III considers the *Garmon* doctrine in those situations where the conduct complained of is arguably protected by federal law.

## I

It is well established that the Board has jurisdiction over unfair labor practices even though they might also be arguable violations of the collective bargaining agreement and subject to arbitration under the terms of the contract. See 29 U. S. C. § 160 (a); *Carey v. Westinghouse*, 375 U. S. 261, 272 (1964); *NLRB v. Strong*, 393 U. S. 357, 360-361 (1969); *NLRB v. Acme Industrial Co.*, 385 U. S. 432 (1967). But as a policy matter the Board will not overturn arbitration awards based on behavior which is also an alleged unfair labor practice if the arbitration proceedings comply with certain procedures, among which is that the arbitrator must have given consideration to the alleged unfair labor practice. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955); *International Harvester Co.*,

138 N. L. R. B. 923 (1962), enforced *sub nom.* *Ramsey v. NLRB*, 327 F. 2d 784 (CA7 1964). The Board has said

"If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." *International Harvester*, 138 N. L. R. B. 923, 927 (1962) (citations omitted).

See also *Carey v. Westinghouse Corp.*, 375 U. S. 261, 270-272 (1964); *Raley's Inc.*, 143 N. L. R. B. 256 (1963).

Thus, not only does Board policy allow arbitrators to pass on conduct which is also an alleged unfair labor practice, but the Board will not consider an unfair labor practice charge *unless* the arbitrator has passed on it.<sup>1</sup> And even then, the Board has made quite clear that its standard of review is far from *de novo*; it will let stand an arbitrator's award not "clearly repugnant" to the Act. See, e. g., *Virginia-Carolina Freight Lines*, 155 N. L. R. B. 447 (1965), where the Board refused to uphold an arbitrator's award allowing discharge of an employee for "disloyalty" where the "disloyalty" consisted of seeking assistance from the Board. The Board's standard of review for arbitration awards seems to be even narrower than the substantial evidence test, for the Board has not

<sup>1</sup> This obviously does not apply unless the parties have agreed to arbitrate. Cf. *Smith v. Evening News*, 371 U. S. 195, 196 n. 1 (1962).

purported to overturn awards simply on the evidence before the arbitrator. The standards chosen by the Board operate entirely separate from the substantial evidence test. See § 10 (a), Administrative Procedure Act, 5 U. S. C. § 1009 (e). In fact, in *International Harvester* itself, the Board agreed to accept the arbitrator's award "since it plainly appears to us that the award is not palpably wrong." To require a wider scope of evidentiary review, said the Board, "would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes 'as part and parcel of the collective bargaining process.'" 138 N. L. R. B., at 929.

Congress, no less than the Board, has indicated its approval and endorsement of the arbitral process even though this may result in controversies being adjudicated by forums other than the Board. Section 203 (d) of the Labor Management Relations Act, 29 U. S. C. § 173 (d), declares

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

See *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 566-568 (1960); *United Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574, 582 (1960). See also § 10 (k), N. L. R. A., 29 U. S. C. § 160 (k). Indeed, § 301 (a) of the L. M. R. A., 29 U. S. C. § 185, may be considered the birthplace of much of modern arbitration law. As the Court said in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 455 (1957): "[Sec. 301] expresses a federal policy that federal courts should enforce these [arbitration] agreements on behalf of or

against labor organizations and that industrial peace can be best obtained only in that way."

Finally, this Court itself has expressed the view, in construing federal law pursuant to § 301 (a), that the policy of encouraging arbitration was sufficient to overcome considerations favoring pre-emption. In the Court's words, "Arbitral awards construing a seniority provision . . . or awards concerning unfair labor practices, may later end up in conflict with Board rulings . . . . Yet, as we held in *Smith v. Evening News Ass'n* [371 U. S. 195, 1962], the possibility of conflict is no barrier to resort to a tribunal other than the Board." *Carey v. Westinghouse Electric Co.*, 375 U. S. 261, 272 (1964).

The cumulative effect of all of this is that the jurisdiction of one forum—in this case, arbitration—is not displaced simply because the Board also has jurisdiction to act. The policy of preemption and, to some extent, of uniformity itself is subordinated to the greater policy of encouraging arbitration of grievances.

Deference to the arbitral forum is not the only instance where arguable or conceded unfair labor practices are excepted from the preemption doctrine. In *Smith v. Evening News*, 371 U. S. 195 (1962), the employee brought suit under § 301 of the LMRA, 29 U. S. C. § 185 (a), to enforce the collective bargaining contract, alleging that the employer discriminated against certain employees because of their union affiliation. The conduct, if proven, would not only have been a violation of the contract but would concededly have been an unfair labor practice as well. The Court expressly rejected the *Garmon* doctrine in the context of such suits, holding that, while Board jurisdiction over unfair labor practices was not displaced when the conduct also allegedly violated the terms of the contract, neither was the jurisdiction exclusive. This result was consistent with the expressed intent of Congress that enforcement of collective bar-

gaining agreements be "left to the usual processes of the law," rather than to the Board. *Dowd Box Co., Inc. v. Courtney*, 368 U. S. 502, 511 (1962). See also *Local 174 v. Lucas Flour Co.*, 369 U. S. 95, 101 n. 9 (1962); Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963).

These cases, like those dealing with arbitration, indicate a willingness to subordinate the *Garmon* doctrine when other, more pressing problems are at hand. Here, the policy to be served was that collective bargaining agreements be enforced by the judiciary, notwithstanding concurrent Board jurisdiction to regulate that activity which was also an unfair labor practice. To be sure, the Court has required that, in the interests of uniform development of the law, state courts must apply federal law. *Lucas Flour, supra*, at 102-104. But the Court was no less aware in *Smith* than it had been nine years earlier in *Garner v. Teamsters Local*, 346 U. S. 485, 490-491 (1953), that "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." The point is simply that the perceived interest in judicial adjudication of contractual disputes was more important than the interests of uniformity that would be promoted by preemption.

In *Vaca v. Sipes*, 386 U. S. 171 (1967), this Court refused to apply the preemption doctrine to suits charging a breach of the union's duty of fair representation, even though the Board had held that such a breach was also an unfair labor practice. *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962). Though one reason for this result was that the duty of unfair representation had been for the most part developed by the judiciary rather than the Board, the other reason was concern over the possibility of denying a hearing to an employee who felt his individual interests had been unfairly subordinated

by the union. The Court expressed fear that, were preemption the rule, "the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." 386 U. S., at 182.

Congress has expressly given a federal cause of action for damages to parties injured by secondary union activity under § 8 (b) (4), which may be enforced by suits brought in either state or federal court. 29 U. S. C. § 187 (b). The union's activity giving rise to liability is of necessity an unfair labor practice, but Congress elected to have the question adjudicated in court, even though the activity might be the subject of a parallel and possibly inconsistent determination by the Board. See *Teamsters Union v. Morton*, 377 U. S. 252, 256 (1964). Of course federal law governs such cases, at least where the union activity is not violent; and presumably the decisions of the NLRB on secondary activity would be consulted for guidance. But the Congress chose not to have the Board hear such suits, even though the Board is probably far more familiar than the courts with the variety of problems posed by secondary activity.

The phenomenon of the no-man's land and the conclusions than can be drawn on preemption are also instructive, for they cast substantial doubt not only on the intent of Congress but on the very foundations of *Garmon* itself. In *Guss v. Utah Labor Relations Board*, 353 U. S. 1 (1957), the Court held that States were powerless to intervene in labor disputes where the NLRB possessed jurisdiction, even though the Board had refused to assert its jurisdiction because of the "predominantly local" character of the company's operations. The Court conceded that this would likely produce "a vast no-man's land, subject to regulation by no agency or court" but

insisted this was the intent of the Congress and that Congress could change the situation if it desired. Congress did change the situation soon thereafter, providing that the States may assert jurisdiction over any dispute where the Board declines to do so because of the insubstantial effect on interstate commerce. 29 U. S. C. § 164 (c). The purpose of this section was to fill the chasm created by *Guss*. See, e. g., 2 Leg. Hist. of LMRDA 1081 (Sen. Goldwater). The situation was roundly condemned by legislators, who called it variously "a no man's land, in which there are grievous wrongs and no remedy under American jurisprudence as of this time," 2 Leg. Hist. 1073 (Sen. McClellan), and "a stench in the nostrils of justice." 2 Leg. Hist. 1150 (Sen. Ervin). In short, the reaction to *Guss* indicates that this Court was quite wrong in determining that the no-man's land was justified in the name of congressional intent to achieve uniformity in law and administration.

Of some interest is the fact that *Garmon* was based upon, and expanded to a significant degree, the rationale of *Guss*:

"It follows [from *Guss*] that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. *The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss.*" 359 U. S., at 246. (Emphasis added.)

Yet five months after the announcement of the *Garmon* decision, Congress in effect overruled *Guss* and thus



at least counselled caution in applying the *Garmon* rationale.

The provisions of § 14 (c), however, do not allow state jurisdiction where the Board refuses to assert jurisdiction for "policy" reasons, as where the General Counsel refuses to issue a complaint because he is not convinced of the merits of the plaintiff's cause. In such a situation, *Garmon* precludes state action (or action by federal courts) because the Board's action does not define the activity "with unclouded legal significance." 359 U. S., at 246. In 1965, the Court eased the harsh strictures of *Garmon* in this area by holding that reasons articulated by the General Counsel for his refusal to issue a complaint would open the way for state action if the explanations "squarely define the nature of the activity" sought to be subjected to Board consideration. *Hanna Mining Co. v. Marine Engineers Beneficial Assn.*, 382 U. S. 181, 192 (1965).

Even though federal law is pervasive in labor-management relations, state law is preserved in some respects. At first blush, it might seem that these matters present no problems of uniformity, for there is no national law being applied. But the simple fact that Congress and this Court have deferred to the States in these areas indicates a subordination of the interest in uniformity to the interests of the States. By making the matter one of state law, Congress has not only authorized multi-formity on the subject, but practically guaranteed it. The results, as far as uniformity is concerned, are no different than if the States applied federal law with abandon. For example, the controversial § 14 (b) of the Taft-Hartley Act, 29 U. S. C. § 164 (b), has authorized States to choose for themselves whether to require or permit union shops. This allows the States to regulate union or agency shop clauses, *Algoma Plywood v.*

*W. E. R. B.*, 336 U. S. 301 (1949), *RCIA v. Schermerhorn*, 373 U. S. 746, 375 U. S. 96 (1963), so that union insistence on a security agreement as part of a collective bargaining agreement may be prohibited in one State and protected or even encouraged in another. The policy choice made by Congress on this matter necessarily subordinated uniformity in national law to what were perceived to be overriding concerns of the States.

Other examples are familiar. In *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656 (1954), the Court upheld a state court damage award for injuries suffered as a result of the tortious conduct of the union's agent, who threatened violence if the company's employees did not join the union. The Court assumed that the union conduct was an unfair labor practice, seeking as it did to interfere with the employee's § 7 right not to join a labor union. But it noted the inadequacy of the existing Board procedure to provide suitable remedies for those injured as a result of the conduct, and was impressed by the fact that to hold the state courts preempted "will, in effect, grant petitioners immunity from liability for their tortious conduct." The Court found "no substantial reason for reaching such a result." 347 U. S., at 664. Accord, *UAW v. Russell*, 356 U. S. 634 (1958); *Linn v. Plant Guard Workers*, 383 U. S. 53, 61-62 (1966). Again, it is entirely possible that some States will require a greater showing of violence than others before awarding damages, so that behavior which violently seeks to coerce union membership will be prohibited in one State and allowed in another. But the interest in uniformity is subordinated to the larger interests that persons injured by such violence be preserved whatever remedies state law may authorize.

To summarize, the "rule" of uniformity which the Court invokes today is at best a tattered one, and at

worst little more than a myth. In the name of national labor policy, parties are encouraged by the Board, by Congress, and by this Court to seek other forums if the unfair labor practice arises in an arbitrable dispute, violates the collective bargaining agreement or otherwise qualifies as one of the exceptions mentioned.<sup>2</sup>

Until today, *Int'l Assn. of Machinists v. Gonzales*, *supra*, had been thought to stand for the proposition that *Garmon* did not reach cases "when the possibility of conflict with federal policy is . . . remote." 356 U. S. 617, 621. But with today's emasculation of *Gonzales*, there is probable little that remains of it. *Linn v. Plant Guard Workers*, 383 U. S. 53 (1966), was ostensibly based in part on this rationale, 383 U. S., at 59-61, but it was equally bottomed on *Laburnum Construction* and other cases upholding state power to regulate matters of "overriding state interest" such as violence or, as in *Linn*, defamation. I see no reason why this exception has not, for all practical purposes, thus expired. In my view, however, and for the reasons set forth in Part II, *Gonzales* controls this case.<sup>3</sup>

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<sup>2</sup> A possible addition to the list of exceptions is the provision of § 10 (a), 29 U. S. C. § 160 (a), which allows the Board to cede jurisdiction over labor disputes to state agencies if state law is not inconsistent with federal law. However, this provision has never been invoked by the Board. The Developing Labor Law 807 (C. Morris ed. 1971).

<sup>3</sup> With all respect, the majority's attempt to distinguish the instant case from *Gonzales* is unpersuasive. According to the majority, "The reasons for *Gonzales*' deprivation of union membership had nothing to do with matters of employment, while *Lockridge*'s cause of action and claim for damages was based solely upon the procurement of his discharge from employment." Slip op., at 21. In the first place, *Lockridge* squarely alleged that his damages had been caused by suspension from union membership contrary to the constitution and laws of the union; his cause of action was bottomed upon this breach of duty by the union. More importantly, it is in-

## II

There are two broad, but overlapping, relationships among employers, labor unions, and union members. On the one hand, there is the relationship between employer and employee, generally termed labor-management relations, which involves the union at virtually every step, where the employees have chosen to be represented by one. The other relationship, union-member relations, involves the affairs between the union and the employee as union member.

In enacting the NLRA in 1935, Congress defined and prohibited unfair labor practices by employers. Experience under the Act showed that labor organizations were quite as capable as employers of pernicious behavior, and in 1947 Congress enacted the Labor Management Relations Act, 61 Stat. 136, which, among other things, protected employees and employers against certain unfair labor practices by labor organizations that were defined by the Act. Protection given employees, whether union members or not, was primarily job-related. Although unions were forbidden to restrain or coerce employees in the exercise of their § 7 rights, Congress expressly negated any intention to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. . . ." 29 U. S. C. § 158 (b) (1). The unmistakable focus of both the NLRA and

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accute to imply, as the foregoing quoted statement does, that Lockridge is somehow different from Gonzales in that Gonzales' "deprivation of union membership" did not result in his loss of employment. The *Gonzales* Court said, "[t]he evidence adduced at the trial showed that plaintiff, *because of* his loss of membership, was unable to obtain employment and was *thereby* damaged. . . . [T]his damage was not charged nor treated as the result of an unfair labor practice but *as a result of* the breach of contract." 356 U. S., at 622, n. \*. (Quoting the California court's opinion.) (Emphasis added.)

the LMRA is on labor management relations, rather than union-member relations, as such.

During the 1950's there came to light various patterns of union abuse of power, and in the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519, Congress acted to correct these evils by directly addressing itself to some aspects of union-member affairs. The LMRDA provides a "bill of rights," which gives union members the right to participate in union affairs, to speak freely, and to be protected from arbitrary discipline. It also imposes certain requirements on unions to disclose their financial affairs, regulates union elections, and safeguards labor organizations against unscrupulous agents or officers. Throughout the Act are provisions for civil or criminal enforcement of the Act in federal courts. See 73 Stat. 523, 525, 529-530, 531, 534, 536, 537, 539. But in a crucial departure from what the Court has held the legislative intention was in regulating labor-management relations, the Congress declared:

"Except as specifically provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer . . . or other representative of a labor organization . . . under any other Federal law or under the laws of any State and, *except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.*" § 603 (a), 73 Stat. 540, 29 U. S. C. § 523 (emphasis added).

If this were not clarity enough, Congress also provided in Title I, the "bill of rights,"

"Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any

court or other tribunal, or under the constitution and bylaws of any labor organization." § 103, 73 Stat. 523, 29 U. S. C. § 413.

Beyond any doubt whatever, although Congress directly imposed some far reaching *federal* prohibitions on union conduct, it specifically denied any preemption of rights or remedies created by either state law or union constitutions and bylaws. Thus, as to union-member relations, any parallel rights created by the States, either directly or indirectly through enforcement of union constitutions or bylaws, were to stand at full strength. Congress backed up this power by requiring unions to make available to members the constitution and bylaws of the union, as well as financial information. § 201, 73 Stat. 524.

The LMRDA was a major effort by Congress to regulate the rights and responsibilities of the union-member relationship as such, but, as shown by § 603 (a), it was clearly not an attempt to make federal law the exclusive arbiter of this relationship.<sup>4</sup> In *Gonzales* the Court

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<sup>4</sup> Not only were the rights and obligations created by the LMRDA made supplemental to state law, but large areas of union-member relations were left untouched. For instance, Title I provides that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . . ." Precisely what a union member may be required to do as part of his "responsibility toward the organization as an institution" is obviously far-ranging, and Congress could no doubt have defined those responsibilities had it chosen to do so. For another instance, Congress protected the right of the union member to sue a labor organization, but conditioned this on whatever exhaustion of "reasonable hearing procedures . . . within such organization" the union may require. When compared to the step-by-step statutory procedure required for the adjudication of unfair labor practices, 29 U. S. C. § 160, it is clear that Congress meant to leave some flexibility to the unions in dealing with member complaints. Still other examples may be seen by noting what Congress omitted

noted that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law . . . ." 356 U. S., at 620. Though in the following year the LMRDA certainly "undertook" to protect members in important respects, it specifically disavowed any notion of preempting state law and thus left unimpaired the *Gonzales*' conclusion that state law has a proper role in union-member disputes.<sup>5</sup>

If, as I have attempted to show in Part I, the Board is not the sole arbiter even of federal law and if, as I have also attempted to show, there is room for the operation of state law in certain areas of even labor-management relations, then to me the conclusion is inescapable that in the area of union-member relations, which Congress has not sought to deal with comprehensively and where Congress has preserved state remedies for the very conduct prohibited by federal law, we should be very careful about assuming congressional intention to brush aside local rights and remedies. Indeed, far from preempting state law, one of the major thrusts of LMRDA was to enforce state rights and remedies. At the very least, the inquiry presented by this or any other case dealing with union-member relations cannot be answered by automatic invocation of the purported rule of preemption in the name of uniformity.

even from mention. Perhaps most important of all in this context is the fact that Congress provided for no central agency, such as it had in the NLRA, to administer the Act. Although the Secretary of Labor has in some respects a major role in implementing the Act, disputes arising under the Act are for the courts in the first instance.

<sup>5</sup> The majority's opinion simply refuses to face this issue. There is no "absence of a contrary expression of intention from Congress," as the majority contends. See p. 13, at n. 5. When Congress addressed itself to union-member relations as such it specifically preserved existing state remedies even though there may be federal remedies to redress the same conduct.



Like many States, Idaho construes the union-member relation to be a contractual one, defined by the constitution and bylaws of the union. As such, the contracts are enforceable through the State's traditional common-law jurisdiction. Here, Lockridge was discharged for alleged nonpayment of dues in accordance with the union constitution and brought suit alleging that he had in fact not been unduly tardy and that the union's action was a breach of the contract. The face of the complaint did not implicate federal law. If the Idaho court were allowed to proceed, it would not have purported to adjudicate an unfair labor practice by reference to federal law but, if it found the conduct unprotected by federal law, see Part III *infra*, would have enforced rights and obligations created by the union constitution. The Court nevertheless holds that because the union conduct alleged in the complaint also constitutes, or arguably so, an unfair labor practice, the controversy must be adjudicated by the National Labor Relations Board. I find little in the Court's opinion to convince me that Congress intended this result. With all respect, I agree with *Gonzales* that this result is at best "abstractly justifiable, as a matter of wooden logic." 356 U. S., at 619.

Furthermore, this Court's decision in *Smith v. Evening News*, *supra*, seems contrary to the result reached today. *Smith* held that suits to enforce the collective bargaining agreement could be brought in state or federal courts under § 301 notwithstanding the fact that the conduct alleged would also constitute an unfair labor practice. Thus, courts enforcing *Smith*-type actions are dealing in contract rights, not unfair labor practices. There seems little reason why suits for breach of the union-member contract cannot similarly be brought in state courts (or in federal courts in diversity actions), notwithstanding the alternate nature of the behavior as an unfair labor practice.

Indeed, § 301 actions are governed by federal law and even here the NLRB does not preempt the courts. There is even less justification for precluding actions under state law in the area of union-member relations which Congress has expressly said is not an exclusively federal domain.

I find no merit in the argument that Congress passed § 301 though recognizing that some § 301 suits would involve unfair labor practices, but, by *not* providing analogous federal court jurisdiction for breaches of union constitutions, manifested its expectation that breaches which also involve unfair labor practices should be a matter for Board jurisdiction. Some readily imaginable union actions prohibited by Title I of the LMRDA could be unfair labor practices as well, but by providing for federal suit to enforce the remedies, and leaving state remedies untouched, Congress certainly disavowed, as clearly as if it had said so explicitly, any notion that the Board was to preempt other forums in passing on statutory breaches which were also unfair labor practices. Arbitration of grievances is a similar situation, since arbitrators, rather than the Board, construe and enforce contractual rights which are breached in the commission of putative unfair labor practices. See Part I, *supra*.

### III

I have attempted to show in Part II that invocation of *Garmon*-type preemption is inappropriate where a union member brings suit against a union for breach of the union's constitution or bylaws. Wholly apart from such considerations, however, I cannot agree with the opinion of the Court because it reaffirms the *Garmon* doctrine as applied to conduct arguably protected under § 7, as well as to that arguably prohibited under § 8. The essential difference, for present purposes, between activity which is arguably prohibited and that which is

arguably protected is that a hearing on the latter activity is virtually impossible unless one deliberately commits an unfair labor practice. In a typical unfair practice case, by alleging conduct arguably prohibited by § 8 the charging party can at least present the General Counsel with the facts, and if the General Counsel issues a complaint, the charging party can present the Board with the facts and arguments to support the claim. But for activity which is arguably protected, there is no provision for an authoritative decision by the Board in the first instance; yet the *Garmon* rule blindly preempts other tribunals. *Int'l Longshoremen's Assn. v. Ariadne Shipping Co.*, 397 U. S. 195, 201 (1970) (WHITE, J., concurring). The Assistant General Counsel of the NLRB has described the situation:

"[A]pplication of the *Garmon* arguably protected test in this situation leaves the employer's interests in an unsatisfactory condition. The employer cannot obtain relief from the state court with respect to activity that may in fact not be protected by section 7 of the Act, and the only way that he can obtain a Board determination of that question is by resorting to self-help measures; if he guesses wrong, this may subject him not only to a Board remedy but also to tort suits. The result is as undesirable as the 'no-man's land' created by the holding in *Guss* . . . ." (Footnotes omitted.) *Come, Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435, 1444 (1970).

I believe that the considerations which justify exceptions to the rule of uniformity apply with greater force to § 7 situations and further, that basic concepts of fundamental fairness, regardless of their effect on the model of uniformity, counsel against any rule which so inflexibly bars a hearing.

## A

The Assistant General Counsel of the Board has stated the paradox succinctly:

"When a union engages in peaceful picketing that is not prohibited by section 8 of the NLRA, a state court cannot enjoin the picketing as a trespass because the activity is 'arguably protected' by section 7. But since there is no unfair labor practice, the employer cannot bring the question before the Board for adjudication. The only way for him to get a Board ruling as to whether the picketing is actually protected is to resort to 'self-help' to expel the pickets, thereby forcing the union to file unfair labor practice charges to which he can raise the status of the picketing as a defense." Come, *supra*, at 1437-1438.

Though the most natural arena for this conflict occurs when picketers trespass on private property, see *Taggart v. Weinacker's, Inc.*, 397 U. S. 223, 227 (1970) (BURGER, C. J., concurring), *Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev. 552 (1970), other instances include "quickie" strikes or slowdowns, see *NLRB v. Holcombe*, 325 F. 2d 508 (CA5 1963), or employees' inaccurate complaints to state officials about sanitary conditions in the plant, *Walls Mfg. Co. v. NLRB*, 321 F. 2d 753 (CA9 1963), or collective activity designed to persuade the employer to hire Negroes. *NLRB v. Tanner Motor Livery, Ltd.*, 349 F. 2d 1 (CA9 1965), or failure to participate in a union check-off. *Radio Officers' Union v. NLRB*, 347 U. S. 17, 24-28, 39-42 (1954).

There seems little point in a doctrine which, in the name of national policy, encourages the commission of unfair labor practices, the evils which above all else were the object of the Act. Surely the policy of seeking uni-

formity in the regulation of labor practices must be given closer scrutiny when it leads to the alternative "solutions" of denying the aggrieved party a hearing or encouraging the commission of a putative unfair labor practice as the price of that hearing.<sup>6</sup>

<sup>6</sup> Perhaps the tools with which the Board can fashion relief in this area are already at hand, in the form of the declaratory order. Such an order is binding on the agency and is judicially reviewable. *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 372 n. 3 (1969); *Frozen Food Express v. United States*, 351 U. S. 40 (1956); *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939); *Pennsylvania RR. v. United States*, 363 U. S. 202 (1960). The NLRA gives the Board "authority . . . to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions" of the NLRA. 29 U. S. C. § 156. The Administrative Procedure Act, in turn, specifically provides that agencies may issue declaratory orders "as in the case of other orders, and in its sound discretion" in order to "terminate a controversy or remove uncertainty." 5 U. S. C. § 554 (e) (Supp. V, 1970). The Board currently provides for declaratory orders in only a few situations, such as for determination of the commercial impact aspect of the jurisdictional issue where the employer has both unfair labor practice charges and representation proceedings pending before the Board, 29 CFR §§ 102.105-102.110. The use of declaratory orders in unfair labor practice proceedings is nonexistent, and the same seems to be true for determining the protectedness *vel non* of activities arguably subject to § 7. See Hickey, Declaratory Orders and the National Labor Relations Board, 45 Notre Dame Law. 89, 106 (1969).

Before an agency may issue a declaratory order, it must have independent subject matter jurisdiction. But we held in *Red Lion*, *supra*, that the FCC's declaratory order in that case could be sustained on any of several grounds including the requirement that the FCC see that the "public interest be served" in granting and renewing licenses. So here, the argument for Board jurisdiction would be that it is empowered to "prevent any person from engaging in any unfair labor practice." 29 U. S. C. § 160 (a). If, as pointed out earlier, the price of not resorting to an adequate forum for resolution of the § 7 status can be the commission of an unfair labor practice, the power of the Board to prevent unfair labor

## B

The exceptions to the preemption rule are so many and so important as to cast substantial doubt on the Court's uncritical resort to it, as I have attempted to show in Part I. When considered in conjunction with arguably protected activity, however, these exceptions do more than mock the rule; they illustrate substantively why invocation of the rule against such activity is a disservice to the greater interests of national labor policy. For example, the refusal to preempt arbitrable disputes serves the policy of encouraging arbitration, a policy universally agreed to be of greater importance than uniformity. See Part I, *supra*. The policy at stake in § 7 cases is simply to secure a resolution of the dispute *at all*. Yet the Court's opinion would insist on preempting such disputes from the States even though there is no way to present them to the Board. If the Board refused to hear a dispute alleging an unfair labor practice because it wished to encourage arbitration, but ignored the fact that the parties had no arbitration clause in their contract, we could hardly consider arbitration to have been encouraged. But, with all respect, the Court's opinion today is just as exasperating.

Similarly, in holding that alleged breaches of the union's duty of fair representation were not preempted, *Vaca v. Sipes, supra*, the Court was apprehensive that the worker would be without a forum if the General Counsel refused to initiate an unfair labor practice complaint. How much more pressing must those considerations be where the Board is in fact barred from regular

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practices gives it jurisdiction to issue such § 7 declaratory orders. Such an order finding certain conduct protected would override state law, but would be reviewable. If the conduct was found unprotected, there would be no barrier to suits based on state law.

adjudication. The "intensely practical considerations" which we felt governed in *Vaca* seem even more practical here, especially in view of the concern expressed in *Vaca* that the aggrieved party be able to obtain a hearing on his complaint. If the possible refusal of the General Counsel to issue a complaint is a prominent reason for refusing to preempt the States, I should think that, *a fortiori*, his inability to act at all is at least as great a justification for doing away with preemption in this situation.

Finally, it must be mentioned that in precluding the aggrieved party from a hearing, we are following a particularly disfavored course. The importance in our jurisprudence of the opportunity for a hearing need not be reviewed, but at the very least it teaches that where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling this result. There is precious little in the *Garmon* doctrine that justifies its existence as to § 7 activities under this test. Certainly neither the evidence of congressional intent nor the presumed but overdrawn interest in uniformity is adequate to justify denial of a hearing.

Most cases concerning the hearing requirement are those where some adverse consequence is visited upon the individual unless he can explain his side of the story, *Bell v. Burson*, — U. S. — (1971), or where there is continuing conflict and dissatisfaction with no tribunal available to fashion relief. Cf. *Boddie v. Connecticut*, — U. S. — (1971). The problems seem similar to those facing us here. In a § 7 case, the employer is faced with, for example, picketing that turns away customers and suppliers and inflicts progressive economic injury on the employer. For a small businessman with no forum available for relief, the effect is similar to a wage earner who finds that claims of another have cut



his take-home pay in half. Cf. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

The majority's treatment of this important issue is deficient. It says only that treating judicial power to deal with arguably protected activity different from the power to deal with prohibited activity would be "unsatisfactory," since "[b]oth areas equally involve conduct whose legality is governed by federal law, the application of which Congress committed to the Board, not courts." Slip op., at 15. I have no quarrel with the first point—by definition federal law will determine if federal law protects the conduct from state proscription; but I hardly see how that alone preempts state courts. See *Dowd Box, Lucas Flour, Smith v. Evening News, Teamsters Union v. Morton*, 377 U. S. 252. As to the second point, the fact is that Congress has not committed the arguably protected area exclusively to the Board. It has provided no mechanism for § 7 cases to get before the Board except where conduct threatens § 7 rights; nor has its functionary, the Board, opened a path to its door for those who seek to ascertain whether conduct threatening them is truly protected by federal law and hence unassailable under local law. Congress found the no-man's land created by *Guss* unacceptable precisely because there was no way to have rights determined. In terms of congressional intention I find it unsupportable to hold that one threatened by conduct illegal under state law may not proceed against it because it is arguably protected by federal law when he has absolutely no lawful method for determining whether that is actually, as well as arguably, the case. Particularly is this true where the dispute is between a union and its members and the latter are asserting claims under state law based on the union constitution. I would permit the state court to entertain the action and if the union defends on the ground that its conduct is protected by federal

law, to pass on that claim at the outset of the proceeding. If the federal law immunizes the challenged union action, the case is terminated; but if not, the case is adjudicated under state law.

MR. JUSTICE BLACKMUN also dissents for the basic reasons set forth by MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE in their respective dissenting opinions.